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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1933

No. 499

THE MOFFAT TUNNEL LEAGUE AND UINTAH BASIN RAILROAD LEAGUE, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

FILED NOVEMBER 4, 1933

(37,196)

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[fols. 1 & 2] [Caption omitted]

IN UNITED STATES DISTRICT COURT, DISTRICT OF DELAWARE

No. 909. In Equity

THE MOFFAT TUNNEL LEAGUE, a Voluntary Association; Uintah Basin Railroad League, a Voluntary Association, Plaintiffs,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Denver and Rio Grande Western Railroad Company, Defendants, and The Denver and Salt Lake Railway Company, Intervenor; The Moffat Tunnel Improvement District and Herbert C. Fairall et al., Members of the Moffat Tunnel Commission, Intervenors; The State of Colorado ex Rel. The Public Utilities Commission of the State of Colorado and Worth Allen et al., Members of said Commission, Intervenors

DOCKET ENTRIES

Octo. 14, 1931.—Bill of complaint filed.

Octo. 20, 1931.—Affidavit as to service on United States of America and Interstate Commerce Commission filed.

[fol. 3] Nov. 10, 1931.—Plaintiffs' motion for preliminary injunction filed.

Nov. 11, 1931.—Answer of Interstate Commerce Commission filed.

Nov. 12, 1931.—The Denver and Rio Grande Western Railroad Company, defendant, appears by Clarence A. Southerland, Esq., its solicitor; same day præcipe filed.

Nov. 12, 1931.—Motion by The Denver and Rio Grande Western Railroad Company to dismiss filed.

Nov. 14, 1931.—Affidavit as to service on The Denver and Rio Grande Western Railroad Company filed.

Nov. 14, 1931.—Answer of United States of America filed.

Dec. 12, 1931.—Petition of The Denver and Salt Lake Railway Company filed; same day order granting petitioner leave to intervene as party-defendant and file answer, &c.; same day order filed.

Dec. 12, 1931.—Answer of The Denver and Salt Lake Railway Company filed.

Jan'y 2, 1932.—Motion of Moffat Tunnel Improvement District et al. for leave to intervene, filed; same day order granting leave to intervene, &c.; same day petition of intervention with Exhibits A, B & C and order filed.

Jan'y 2, 1932.—Acknowledgment of service by attorney for Interstate Commerce Commission filed.

Jan'y 2, 1932.—Acknowledgment of service by Special Assistant to Attorney General, filed.

Jan'y 8, 1932.—Motion of State of Colorado, ex rel. The Public Utilities Commission of the State of Colorado, et al. filed; same day order granting leave to intervene, &c.; same day order and intervening petition filed. (Exit copies.)

Jan'y 20, 1932.—Answer of The Denver and Rio Grande Western Railroad Co. filed.

Jan'y 20, 1932.—Answer of The Moffat Tunnel Improvement District et al. filed.

Jan'y 20, 1932.—Answer of State of Colorado, ex rel. The Public Utilities Commission of the State of Colorado, et al. filed.

[fol. 4] Jan'y 20, 21, 1932.—Hearing.

June 18, 1932.—Opinion of court filed.

July 7, 1932.—Final decree dismissing bill of complaint, &c. with costs to be taxed, &c.; same day decree filed.

July 18, 1932.—Petition of plaintiffs for appeal filed; same day order allowing appeal, bond in the sum of $500 &c.; same day order filed.

Aug. 30, 1932.—Order approving bond of plaintiffs on appeal in the sum of $500, with Fidelity and Deposit Company of Maryland as surety; same day bond filed.

Aug. 30, 1932.—Citation issued.

Sept. 7, 1932.—Citation, with acceptance of service by solicitors for appellees endorsed thereon, filed.

Sept. 7, 1932.—Order extending time for filing condensed record, &c.; same day order filed.

Sept. 27, 1932.—Plaintiffs' notice of lodgment of narrative statement of evidence in clerk's office, filed.

Octo. 10, 1932.—Stipulation filed.

Octo. 12, 1932.—Order extending time for approval of condensed record, &c.; same day order filed.

Octo. 25, 1932.—Stipulation with agreed narrative statement of evidence filed.

Octo. 25, 1932.—Præcipe for transcript of record filed.

[fol. 5] In United States District Court for the District of Delaware

No. 909

The Moffat Tunnel League, a Voluntary Association, and Uintah Basin Railroad League, a Voluntary Association, Plaintiffs,

vs.

United States of America, Interstate Commerce Commission, and The Denver and Rio Grande Western Railroad Company, a Corporation, Defendants

Complaint in Equity—Filed Oct. 14, 1931

To the Judge of the District Court of the United States for the District of Delaware:

[fol. 6] The Moffat Tunnel League, a voluntary association, a citizen of the State of Colorado and having its principal place of business at Steamboat Springs in said State, and Uintah Basin Railroad League, a voluntary association, a citizen of the State of Utah and having its principal place of business at Myton in said State, bring this their bill against the United States of America and the Interstate Commerce Commission, and against The Denver and Rio Grande Western Railroad Company, a corporation duly organized by and existing under the laws of the State of Delaware, and having its principal place of business at the City of Wilmington, New Castle County, in said State, and a citizen and inhabitant of said State, and, therefore, plaintiffs complain and allege that:

I

The plaintiff, The Moffat Tunnel League, is an unincorporated voluntary association organized for the purpose of acting and assisting in the development of the commercial interests of the counties of Moffat, Routt, and Grand, in

the State of Colorado, including the development of adequate railroad transportation facilities for those counties and for the inhabitants thereof; that said plaintiff is a citizen and resident of the State of Colorado and has its principal place of business at Steamboat Springs in said Routt County, State of Colorado; that plaintiff, Uintah Basin Railroad League is an unincorporated, voluntary association organized to promote the interests of the residents of Uintah and Duchesne Counties in the State of Utah in the [fol. 7] matter of securing adequate railroad transportation facilities for said counties; that said plaintiff is a citizen and resident of the State of Utah and has its principal place of business at Myton, Duchesne County, in the State of Utah. The territory included in Uintah and Duchesne Counties, Utah, and in Grand, Routt, and Moffat Counties, Colorado, is locally included under the term Uintah Basin, and frequently so referred to in the hearing in Docket 8070. That each of the plaintiffs was a party in interest to that certain proceeding before Defendant the Interstate Commerce Commission, known as Finance Docket No. 8070—"Application of The Denver and Rio Grande Western Railroad Company for an Order Approving and Authorizing the Acquisition of Control of The Denver and Salt Lake Railway Company by the Purchase of Stock"—which proceeding will hereinafter be referred to as Docket 8070.

II

That defendant The Denver and Rio Grande Western Railroad Company, hereinafter referred to as the Rio Grande—is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and is a citizen and resident of said State of Delaware, and has its principal place of business at the City of Wilmington, in the County of New Castle in said State, and was the applicant in said Docket 8070.

III

The grounds upon which plaintiffs invoke the jurisdiction of this Court are that this is a suit of a civil nature in [fol. 8] equity which arises under the Constitution and Laws of the United States, wherein the matters in controversy exceed, exclusive of interest and costs, the sum or

sums of three thousand dollars ($3,000.00), and is brought to set aside, annul and suspend an order of defendant, the Interstate Commerce Commission, which order relates to transportation and was made upon the petition of defendant the Rio Grande, in said Docket 8070.

IV

That on February 1, 1930, defendant the Rio Grande petitioned defendant Interstate Commerce Commission for an order permitting it to acquire control, by stock purchase, of The Denver and Salt Lake Railway Company. The plaintiffs herein, pursuant to the rules of procedure of defendant, the Interstate Commerce Commission, each filed a petition in intervention therein, alleging that it was a party having an interest in said Docket 8070 and the matters therein involved, and prayed that it might be made a party thereto. That said petition of each of these plaintiffs was granted and each of the plaintiffs herein became a party to said Docket 8070—participated in the said hearings therein, presented testimony at the hearings therein, and filed briefs and participated by counsel in the oral argument in said Docket 8070.

That attached hereto as Exhibit A is a map showing approximately the line of railroad of defendant the Rio Grande, and the line of railroad of The Denver and Salt Lake Railway Company, hereinafter referred to as the Moffat Road, and the geographic relationship of said lines of [fol. 9] railroad to each other and to the Counties of Grand, Routt and Moffat in the State of Colorado, and to the Counties of Uintah and Duchesne in the State of Utah, and also showing the approximate route of the proposed Dotsero Cut-Off referred to in the decision and order in said Docket 8070, and the route referred to in said Docket 8070 as the western extension of the Moffat Road.

V

That in said Docket 8070 defendant the Interstate Commerce Commission, on September 15, 1931, by supplemental report and order, entered an order granting to defendant the Rio Grande, authority to acquire by stock purchase the control of the Moffat Road, copy of which supplemental report and order is hereto attached as Exhibit B. That

prior thereto and on December 2, 1930, defendant the Interstate Commerce Commission filed its opinion and findings, copy of which is hereto attached marked Exhibit C, finding that the proposed acquisition of the Moffat Road by the Rio Grande would be in the public interest, to which finding these plaintiffs duly filed objections and petitioned to reopen and rehear the case, which was denied by order entered by defendant the Interstate Commerce Commission on March 3, 1931.

VI

Application of defendant the Rio Grande, in said Docket 8070, was based upon Paragraph 2 of Section 5 of Title 49 U. S. Code, and plaintiffs aver that no "hearing" on the question whether such acquisition "will be in the public interest" was ever held by defendant the Interstate Com- [fol. 10] merce Commission, and in that regard allege that at the hearing held by defendant the Interstate Commerce Commission in said Docket 8070, material evidence offered by these plaintiffs and by other parties at said hearings, relevant to the question of whether such acquisition "will be in the public interest," was excluded by the Examiner in charge of such hearings. That a transcript of all of the evidence introduced at said hearings bearing upon the matters herein involved is hereto attached, marked Exhibit D.

That it appears from said Exhibit D that, at the purported hearings in Docket 8070, evidence material to the question of public interest in the proposed acquisition of the Moffat Road by the Rio Grande was offered and rejected, said evidence being upon the following matters:

(1) That the construction of the Moffat Road has from the beginning included a plan under frequent public and railroad discussion for a western extension of the Moffat Road from Craig; that the construction of the Moffat Tunnel was in aid of this project as well as the Denver-Craig traffic and the Dotsero Cut-Off.

(2) That in the assessment of benefits in the Moffat Tunnel District there was from the beginning included in such benefits the likelihood of a connection west from Craig, and that benefits were assessed by the Tunnel Commission on the basis of evidence of benefits which would result to the lands in the Moffat Tunnel Improvement District from

railroad operating through the Tunnel over the three routes, namely, the Dotsero Cut-Off, the Denver-Craig line, and Denver to Utah via a western extension of the Moffat Road.

(3) That the organization of the Moffat Tunnel District and the construction of the Moffat Tunnel were based on a long series of public activities and public campaigns, and as a means of facilitating successful operation of the Moffat Road not only as a local road, but also as a through route which it was expected would be made with Utah common points and other points west of Craig by an extension of the Moffat Road.

[fol. 11] (4) That the construction of the Moffat Tunnel has been a matter of public importance to the State of Colorado since 1912; that during that time several projects were put forward and votes taken, both by the Legislature and the people, and that in each instance the people in the territory included in the Moffat Tunnel District voted for the construction, and the people in the territory which would be benefited by the acquiring of the Moffat Road by the Rio Grande consistently voted against it.

(5) That the public interest, convenience and necessity require the construction of an extension from Craig; that from the time construction of the Moffat Road commenced, and throughout the period since such commencement, the public has been asked to assist it in one way or another, including the passage of the Tunnel Act, it was consistently held out that the purpose was to construct the road westward, and that the public would not have agreed to tax themselves if that hope had not been held out.

(6) The available resources of the Uintah Basin, including Duchesne, Unitah, Grand, Routt and Moffat Counties, for the purpose of showing the public interest in having a railroad constructed west from Craig to either Provo or Salt Lake City.

(7) That many hundreds of settlers were induced to go into the Uintah Basin by reason of prospects held out to them by the Moffat Road, Government Agents and commercial bodies of the imminent probability of the extension of the Moffat Road through the Basin; that they have since

left and stated as their reason the present lack of railroad facilities.

(8) That the Moffat Road conducted a long campaign of colonization, and held out to the public and possible settlers, that its purpose and intent were to extend the line to either Provo or Salt Lake City, and that witness Paul, under instruction of the Vice-President of the road, published half page advertisements, holding out that inducement.

(9) That the United States Government, by posters in post offices and other public buildings, held out similar inducements to the Public to colonize this action by advising them of the probability of the extension of the railroad.

(10) All evidence, except that of the Rio Grande, relative to the construction of the Dotsero Cut-Off, the public in-
[fol. 12] terest therein, and the financing thereof.

(11) Evidence that the control of the Moffat Road by the Rio Grande would enable the latter to divert traffic from the former and thereby financially wreck the former.

(12) Evidence that the coal, which constitutes one of the principal items of traffic of the Moffat Road, is competitive with the coal which constitutes an important item of traffic of the Rio Grande and that if the Rio Grande is permitted to obtain control of the Moffat Road it could use such control to destroy the Moffat Road's coal traffic for the benefit of the Rio Grande coal traffic.

(13) Evidence that the Rio Grande has at all times been opposed to the extension of the Moffat Road westward beyond Craig.

That by reason of the exclusion of evidence, as above indicated, no hearing, such as is required by Paragraph 2 of Section 5 of Title 49 of the U. S. Code has been held and that, therefore, the purported order of defendant the Interstate Commerce Commission in said Docket 8070, is illegal, null and void.

VII

That since the order of defendant Interstate Commerce Commission in Docket 8070 was issued, being the order herein sought to be enjoined, defendant the Rio Grande has

publicly announced by statements made by its officers in the public press, that it is unable at this time to finance the purchase of the control of the Moffat Road and the construction of the Dotsero Cut-Off, and that for the present it cannot go ahead with the carrying out of the terms of the said Order in Docket 8070.

[fol. 13]

VIII

That there is no evidence in said Docket 8070 that the acquiring control of the Moffat Road by Defendant the Rio Grande, would be in the public interest, and, therefore, that the order of defendant the Interstate Commerce Commission, in Docket 8070, is entirely unsupported by any evidence and is, therefore, illegal, null and void.

IX

That some of the communities and businesses represented by plaintiffs are entirely dependent upon the Moffat Road for railroad facilities; that some of the communities and businesses represented by plaintiffs which are now without railroad facilities have been built up and developed upon the faith that the repeated promises that the Moffat Road would be extended westward from Craig, its present terminus, to Provo, and/or Salt Lake City, Utah, would be fulfilled; the control of the Moffat Road by the Rio Grande, will, as plaintiffs are informed and believe and therefore allege the fact so to be, result in delaying and preventing the extension of the Moffat Road westward from Craig and will result in hampering and restricting the Moffat Road in furnishing railroad facilities to the communities represented by plaintiffs. Plaintiffs further allege that heretofore, a public improvement district, known as The Moffat Tunnel Improvement District of Colorado, was created by the Legislature of Colorado for the purpose of constructing a railroad tunnel known as the Moffat Tunnel, to improve [fol. 14] the railroad facilities of the Moffat Road and to thereby encourage the construction of the Moffat Road westward beyond Craig, and that for the purpose of constructing said Moffat Tunnel said Improvement District issued bonds for several millions of dollars, which bonds are by law a lien upon the lands within said The Moffat Tunnel Improvement District of Colorado, and that all of the lands

in said Grand, Routt and Moffat Counties in Colorado being the Counties represented by The Moffat Tunnel League—are within said Improvement District; and plaintiffs further allege in that regard that if the Rio Grande is permitted to acquire control of the Moffat Road and thereby prevent the construction of the Moffat Road westward beyond Craig, it will have the effect of diverting the main benefits of the construction of the Moffat Tunnel from the Counties represented by your petitioner, and which Counties are liable for the payment of the lawful bonds issued for The Moffat Tunnel construction and to bestow said benefits upon counties served by the Rio Grande which are outside of the said Improvement District and which counties and the lands therein are not liable for the payment of said bonds.

X

That by reason of the matters hereinbefore alleged, the carrying out of the order of defendant The Interstate Commerce Commission in said Docket 8070, will cause great damage and injury to plaintiffs and the interests represented by them, greatly in excess of the sum of Three Thousand Dollars, ($3,000.00); that the carrying out of said order will result in impairing the present and prospective values of lands in the Uintah Basin, and will result in great [fol. 15] and irreparable damage and injury to the communities and businesses represented by these plaintiffs in said Docket 8070.

XI

That plaintiffs have no plain, speedy or adequate remedy at law in the premises.

Wherefore plaintiffs pray the Court for a temporary writ of injunction enjoining and restraining defendant The Denver and Rio Grande Western Railroad Company, its agents, servants and employees, from in any manner taking any further action pursuant to the order of the Interstate Commerce Commission in Docket 8070 in acquiring control, by stock purchase, of the Moffat Road, until the further order of this Court.

1. That upon the final determination of this cause the said temporary injunction shall become permanent.

2. That the said order of the Interstate Commerce Commission in said Docket 8070 authorizing defendant The Denver and Rio Grande Western Railroad Company to acquire control of the Moffat Road by stock purchase, be decreed to be illegal, and wholly null and void.

3. For such other and further order or orders as to this Court may seem just and equitable in the premises.

(Sgd.) Hering & Morris, (Sgd.) by J. J. Morris, Jr.,
Solicitors for Plaintiffs.

[fol. 16] *Duly sworn to by W. H. Paul. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 18] EXHIBIT "B" TO BILL OF COMPLAINT

Original

Interstate Commerce Commission

Finance Docket No. 8070

DENVER & SALT LAKE RY. CO. Control

Submitted July 17, 1931. Decided September 15, 1931

Order entered authorizing acquisition by the Denver & Rio Grande Western Railroad Company of control of the Denver & Salt Lake Railway Company by purchase of capital stock. Previous report 170 I. C. C. 4

Winslow S. Pierce and Henry McAllister for applicant.

Supplemental Report of the Commission

By the COMMISSION:

On February 1, 1930, The Denver and Rio Grande Western Railroad Company, hereinafter referred to as the Rio Grande, filed an application under section 5 (2) of the interstate commerce act for an order authorizing it to acquire control of The Denver and Salt Lake Railway Company, hereinafter called the Moffat, by the purchase of a majority of the capital stock of that carrier. Objections to the granting of the application were presented, a hearing was held, briefs were filed, and the case was argued orally.

On December 2, 1930, 170 I. C. C. 4, we announced our finding that the proposed acquisition would be in the public interest. No order was entered at that time, and the record was held open for the filing by the Rio Grande of its acceptance of three conditions, viz: (1) That it should purchase for cash, at not exceeding $155 per share, any shares of capital stock and/or voting trust certificates of the Moffat which might be offered to it for purchase within six months from the date of the order to be entered herein; (2) that it, through the Moffat, should establish such through routes in connection with any western connection hereafter constructed under our authority as we might find in a subsequent proceeding or proceedings to be rea-

sonable and in the public interest; and (3) that it, through the Moffat, should commence the construction of the Dotsero cut-off within six months from the date of any order to be entered herein authorizing the proposed acquisition of control, and should complete such construction within two years after beginning it.

The Dotsero cut-off is proposed to be constructed between Orestod on the Moffat and Dotsero on the Rio Grande, 41.3 miles. Application for authority to construct the line was filed by the Denver & Salt Lake Western Railroad Company, hereinafter called the Western, all the capital stock of which is owned by the Moffat. In that proceeding, Finance Docket No. 4555, Proposed Construction by Den- [fol. 19] ver & S. L. W. R. Co., 154 I. C. C. 51, decided April 15, 1929, we announced our finding that the public convenience and necessity required the construction of the Dotsero cut-off upon condition that the Rio Grande be permitted to operate over it, and over the Moffat line between Orestod and Utah Junction, near Denver, on fair and reasonable terms. The issue of a certificate was deferred and the record held open pending the filing and approval of agreements governing such operation.

The two cases became directly connected because of the situation presented by the cut-off and its proposed operation by the Rio Grande. Extensions of time for the filing of the Rio Grande's acceptance of the conditions prescribed in the instant case were granted on representations to the effect that a trackage agreement with the Moffat was in prospect. On July 17, 1931, a joint trackage agreement was filed, the terms and conditions of which will be found described in our supplemental report in Proposed Construction by Denver & S. L. W. R. Co.

This provides for the operation by the Rio Grande over the line of the Moffat between Orestod and Utah Junction. We shall issue, coincidently herewith, the certificate sought by the Western in the application recorded in Finance Docket No. 4555 upon the understanding that an appropriate application will be filed by the Rio Grande for authority to operate over the proposed cut-off and the Moffat line. An agreement providing for the lease of the property of the Western to the Rio Grande has been executed by the parties.

Also on July 17, 1931, the Rio Grande, through its president, filed its formal acceptance of the three conditions prescribed by us on December 2, 1930, in the instant case, as hereinbefore described. The acceptance is qualified only by the substitution of the Western for the Moffat as the medium through which the construction of the Dotsero cutoff shall be prosecuted in accordance with the time stated for beginning and completing construction. This modification is required by the facts, and the Rio Grande's acceptance of the conditions is considered to be in full compliance with our report of December 2, 1930.

An appropriate order will be entered.

Chairman Brainerd, and Commissioners Eastman and Tate did not participate in the disposition of this case.

[fol. 20]

Order

At a General Session of the Interstate Commerce Commission Held at Its Office, in Washington, D. C., on the 15th Day of September, A. D. 1931

Finance Docket No. 8070

Denver & Salt Lake Ry. Co. Control

A hearing and investigation of the matters and things involved in this proceeding having been had, and said division having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the acquisition by The Denver and Rio Grande Western Railroad Company of control of The Denver and Salt Lake Railway Company by the purchase of capital stock, as set forth in the application and reports aforesaid, be, and the same is hereby, approved and authorized.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 21] EXHIBIT "C" TO BILL OF COMPLAINT

F-4358

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET No. 8070

DENVER & SALT LAKE RAILWAY COMPANY CONTROL

28905-31-1

FINANCE DOCKET NO. 8070

DENVER & SALT LAKE RAILWAY COMPANY CONTROL

Submitted July 14, 1930. Decided December 2, 1930.

Acquisition by the Denver & Rio Grande Western Railroad Company of control of the Denver & Salt Lake Railway Company by purchase of capital stock found to be in the public interest, subject to the conditions imposed. Entry of order deferred.

Winslow S. Pierce and *Henry McAllister* for applicant.

Robert E. Winbourn and *Colin A. Smith* for State of Colorado; *Norton Montgomery* and *Erskine R. Myer* for Moffat Tunnel Improvement District and Moffat Tunnel Commission; *William W. Garwood* for Moffat Tunnel Taxpayers' Association; *James G. Rogers* and *Harry S. Dickinson* for Denver Chamber of Commerce, Denver Union Stock Yard Company, and Denver Real Estate Exchange; *J. S. Earley* for Utah Shippers Traffic Association and Salt Lake Chamber of Commerce; *Albert L. Vogl, Oscar W. Carlson, Carle Whitehead,* and *Floyd F. Miles* for Moffat Tunnel League and Uintah Basin Railroad League; *Julian Bamberger, A. B. Irvine, S. D. Thurman,* and *D. A. Skeen* for Salt Lake & Denver Railroad Company; *E. E. Corfman, Thomas E. McKay,* and *John E. Benton* for Public Utilities Commission of Utah; *Clarence A. Miller, Moultrie Hitt,* and *G. Kibby Munson* for bondholders' committee of Rio Grande Southern Railroad Company; *George E. Collings* for mine operators and people of Rico, Colo., interveners.

Dan S. Jones for Public Utilities Commission of Colorado.

F. A. Leland for southwestern lines.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions were filed to the report proposed by the examiner and the case was argued orally.

The Denver & Rio Grande Western Railroad Company, hereinafter referred to as the applicant or the Rio Grande, on February 1, 1930, filed an application under section 5 (2) of the interstate commerce act for an order authorizing it to acquire control of the Denver & Salt Lake Railway Company, hereinafter called the Moffat, by the purchase of a majority of the capital stock of that carrier. Both companies are carriers by railroad subject to the act.

Objections to the granting of the application were presented by the Moffat Tunnel League and the Uintah Basin Railroad League. The State of Colorado is an intervener, but its position in the matter is not disclosed by the record. The other interveners are opposed to approval of the proposal unless we prescribe certain conditions in granting the application, as will be explained later. The Public Utilities Commission of Colorado recommends that the application be granted conditioned upon the early construction by the applicant of a cut-off line to connect the Rio Grande with the Moffat road, and the installation of 1-line operation by the former into Denver, Colo. A hearing was held at Denver, in which the Colorado commission participated, and was continued at Salt Lake City, Utah.

Under an order entered by us on December 12, 1923, 82 I. C. C. 767, a reorganization of the applicant took place, and in the following year we granted authority for the acquisition by the Missouri Pacific Railroad Company of a half stock interest in the applicant. 90 I. C. C. 172. At the present time the applicant's common capital stock, which is the only class having voting rights, is held in equal parts by the Missouri Pacific and the Western Pacific Railroad Corporation, the latter a holding company for the Western Pacific Railroad Company.

The applicant's main line extends from Denver southerly about 119 miles to Pueblo, Colo., where connection is made with the Missouri Pacific, thence westerly to Salt Lake City, the eastern terminus of the Western Pacific, and to Ogden, Utah, where connection is made with the transcontinental route of the Union Pacific. The applicant has numerous secondary lines lying generally to the south of its main line. There is no connection between the Moffat, control of which is proposed to be acquired by the applicant, and the Missouri Pacific. The applicant's reorganization plan of January 15, 1923, modified by a supplemental agreement on February 29, 1924, provided in its policy for the utilization of the Moffat road as a short connection to Denver, such a connection being considered essential to the ultimate success of the Rio Grande. According to the applicant's principal witness, the chairman of its executive committee, this provision was requested by the Western Pacific in connection with the acquisition of a one-half interest in the Rio Grande by the Missouri Pacific, and it was willingly acceded to. The utilization of the Moffat road in the manner mentioned would be effected by building a 41-mile line known as the Dotsero cut-off, between Orestod on the Moffat and Dotsero, on the Rio Grande. Application for authority to construct such a line was filed in *Proposed Construction by Denver & S. L. W. R. Co.*, 154 I. C. C. 51. The applicant therein is a subsidiary of the Moffat. On April 15, 1929, we announced our

finding that the present and future public convenience and necessity require the proposed construction, provided the Rio Grande be permitted to operate over the line, and over the Moffat road between Orestod and Utah Junction, near Denver, on fair and reasonable terms. 154 I. C. C. 51. Pursuant to our order, the Rio Grande submitted a draft of an operating contract and lease which it was willing to execute with the Moffat and/or its subsidiary, but no arrangement by the carriers has been consummated.

The Moffat road extends from Utah Junction in a general westerly direction to Craig, Colo., approximately 232 miles, and has no branches. At Denver, connection and interchange with the Rio Grande is effected. Following a receivership, and sale of the railroad, a reorganization plan for the Moffat was approved by us in 1926, 117 I. C. C. 397, and the property then passed from the ownership of the Denver & Salt Lake Railroad Company to that of the Denver & Salt Lake Railway Company, a Delaware corporation. The present capital structure of the Moffat consists of 50,000 shares of stock, having no par value, $2,500,000 of first-mortgage bonds, and $11,000,000 of income mortgage bonds. Interest in the amount of $810,000 was paid on the funded debt in 1928 and in 1929. The income account of the Moffat shows an increase in net operating revenue from $734,784 in 1927 to $1,754,483 in 1929, an increase in gross income from $944,312 in 1927 to $1,966,080 in 1929, and an increase in net income from $131,875 (deficit) in 1927 to $610,068 in 1929. On February 14, 1928, operation began through the Moffat tunnel at the Continental Divide. This tunnel, which is about 6 miles long, is situated on a 10-mile line owned by the Moffat Tunnel Improvement District, hereinafter called the tunnel district. One of the interveners sought to show by analyzing the carrier's operating ratios that the use of the tunnel contributed materially to the good financial showing made by the Moffat since the date mentioned, despite the annual rental paid.

The applicant represents that after we had announced our plan for the consolidation of railways, 159 I. C. C. 522, by which plan the Rio Grande and the Moffat were placed in system No. 18, Missouri Pacific, an opportunity was afforded to purchase stock of the Moffat, and the applicant acquired 21,334 shares at a cost of $155 per share. This purchase was represented by stock certificates covering 4,877 shares, and the voting-trust certificates corresponding to 16,457 shares. Under a voting-trust agreement dated April 1, 1927, five trustees are authorized to vote the stock of the Moffat for the election of directors and for other purposes until April 1, 1937, unless the trust be sooner terminated by the trustees or the stock held by them be disposed of. On January 21, 1930, the applicant entered

into an agreement with George H. Burr & Company of New York City for the purchase of 7,635 additional shares, represented by stock or voting-trust certificates, the consideration to be paid being $155 per share plus carrying charges at 5 per cent from January 22, the date of purchase by Burr & Company, and the transaction to be subject to the commission's approval. This block of stock and the amount already purchased aggregate 28,969 shares, or 57.94 per cent of the total outstanding stock of the Moffat. The applicant's outlays have been made from cash on hand, and it is stated that there is no immediate necessity for financing by an issue of securities.

The stock of the Moffat is not listed on any exchange, and its market value is not readily ascertainable. The applicant claims that the price of $155 per share, which was represented to be the best that could be obtained, is reasonable in view of the potential earning power of the Moffat and the great advantage and necessity for the short route to Denver.

The general balance sheet of the Moffat, as of October 31, 1929, showed investment in road and equipment $16,515,633.88, improvements on leased railway property $32,540.22, investments in affiliated companies $900, other investments $2,735,692.88, current assets $1,599,987.29, deferred assets $240.41, unadjusted debits $72,865.82, capital stock (50,000 shares, no par) $5,110,035.42, long-term debt $13,500,000, current liabilities $458,604.45, unadjusted credits $500,028.84, profit and loss credit balance $1,389,191.79. The figures in the balance sheet indicate a book value of approximately $130 a share. In *Denver & Salt Lake R. Co.*, 119 I. C. C. 483, we found the value as of June 30, 1919, of the properties owned and used by the Moffat to be $15,035,500, which contained an allowance of $496,000 for working capital, including material and supplies. Net additions and betterments to October 31, 1929, are shown as $1,976,133.88. Deducting from our valuation, plus the net additions and betterments, $496,000 allowed for working capital, and making adjustment of the other items of assets and liabilities shown in the balance sheet, would also indicate a value of approximately $130 a share. The net income of the Moffat in 1929 equaled $12.20 a share.

The applicant is willing to purchase any minority stock holdings in the Moffat at the price of $155 per share within a reasonable period, say six months, from the date of our order, and it assents to the imposition of a condition to that effect.

It was explained that the proposed acquisition of stock will not necessarily give the applicant immediate control of the Moffat, because of the existence of the voting trust, but it was stated that two of the five trustees would be designated by the applicant, and it is understood that one of the others is willing to resign.

Two of the interveners argue that the applicant's acquisition of partial control would be of doubtful legality, and that the large purchases already made should not be considered a circumstance in favor of granting the application. But neither the price paid and proposed to be paid for the stock nor the manner of acquisition were otherwise attacked, and there is no showing of unreasonableness or unfairness in the matter of the terms and conditions attached to the acquisition of control, as described in the record. The minority interest made no representations in the proceeding.

The considerations presented by the various interveners involve the following specific matters: The question of the terms under which the Moffat and the applicant will use the Moffat tunnel; the building of the Dotsero cut-off; the bearing on this case of the possible future construction of a railroad connecting with the Moffat at its western end; the degree in which the Moffat and the Rio Grande are competitive; and the question of whether the applicant should acquire the Rio Grande Southern Railroad or make any provision in its behalf at this time.

The railroad portion of the Moffat tunnel was leased to the Moffat for a term of 50 years from January 6, 1926, with an option to extend the term under certain conditions. The lessor is the tunnel district, acting through the Moffat Tunnel Commission, hereinafter called the tunnel commission. The tunnel district, as established by the Moffat tunnel law, enacted by the State of Colorado in 1922, embraces territory on either side of the Moffat road considered to receive benefit from the tunnel, and similar territory west of Craig, extending to the Colorado-Utah State line. That part of the tunnel which is to be devoted to carrying water across the Divide is unfinished. As a basis for the lease 66 2/3 per cent of the value of the entire project was assigned to the railroad, the final cost being then estimated at $9,700,000. An issue of $6,720,000 5½ per cent bonds had been made under date of July 1, 1923, and a supplemental bond issue of $2,500,000 had been made under date of January 1, 1925. The schedule of rental payments under which the Moffat assumed its share of the obligation of principal and interest on the total bonded debt of $9,220,000, together with an allowance for maintaining the tunnel commission, shows payments of $345,900 per annum until and including 1942, $563,740 in 1943, and increasing amounts during the succeeding years. Provision was made in the contract for additional rental, beginning on January 1, 1974, to cover additional indebtedness which might be incurred in connection with constructing the tunnel, up to the sum of $1,000,000. The final cost has greatly exceeded all estimates, having reached $15,470,000, and this expenditure is covered by four bond issues. Taxes to the amount of

$516,000 were collected from property owners by the tunnel district in 1928 and in 1929, in order to meet the interest on the supplemental bonds and on part of the original bonds. The legality of the later supplemental bonds is involved in litigation, but all bonds when proved to be legal are a lien against the property in the tunnel district, including that owned by the railroads. The assessed value of the property in the tunnel district is between $325,000,000 and $350,000,000. The benefits from the tunnel were determined to be 15 per cent of the appraised property value, and 88 per cent of the total benefits were assigned to the city and county of Denver in the last assessment. Under the railroad lease, approximately one-half the total principal and interest of the indebtedness finally incurred by the tunnel district is borne by the Moffat.

The lease of the tunnel to the Moffat is in litigation. The tunnel district, attacking the validity of the lease, now contends that the value of the use to the railroad company should be fixed at 87 per cent of all uses, and that the total cost of $15,470,000 should be made the basis of the rental on the ground that the previous cost basis was a mistake of fact. On this theory the Moffat would be required to pay a rental of $850,000 per annum. On October 26, 1929, the United States District Court for Colorado entered a decree sustaining the existing lease in the matter of the amount of rental, but nullifying certain of its provisions. Appeal was taken on an assignment of errors. It was understood that this appeal would be heard by the United States Circuit Court of Appeals for the Tenth Circuit in June, 1930, and a decision was expected in the following autumn.

The applicant relies on those provisions of the present lease which were not disturbed by the ruling of the lower court, and on those of the Moffat tunnel law, contending that it may use the tunnel under a sublease or through the use of the Moffat road under a trackage agreement such as it proposed in compliance with our order in Finance Docket No. 4555. It expresses conviction that the Moffat has the right under the existing contract to grant trackage rights, including joint use of the tunnel, and that the court decree in no way nullified or abridged the power of the Moffat to assign or sublease its operation. This is emphatically denied by the tunnel authorities, who argue that the decree so altered the tenor and effect of the contract that the Moffat has no right directly or indirectly either to sublease the tunnel or to permit a trackage agreement which would create a monopoly of this public improvement. There is also disagreement as to whether the decree, holding the present lease to be valid, does or does not require the Moffat to pay rental fixed by the contract, whether it uses the tunnel or not. Obviously

these questions must remain unsettled until the court of appeals renders its decision.

The applicant's chairman contends that the present rental is reasonable and is all that the company can afford to pay. In the brief it is stated that the Moffat, alone or in conjunction with the Rio Grande, can not afford to meet the demands of the tunnel commission. As to the amount of traffic involved, the testimony is that the Moffat is now operating about seven trains through the tunnel daily and that the tonnage now being handled is about 40 per cent of what the total tonnage will be when the Rio Grande sends its traffic over the line. The number of trains operated, however, may not vary proportionally with the amount of tonnage. Rather than make another lease under terms which might not warrant the use to be made of the Dotsero cut-off, the applicant states that it would build a new tunnel, 4 miles long, in the general vicinity of the present tunnel, at a cost estimated at $6,500,000, requiring about three years for construction. It is admitted that such an alternative would be unfortunate, but confidence is felt that the project could be financed. Professing itself willing to pay a fair rental for use of the existing tunnel, the applicant contends that the rental should not exceed that based on the alternative route, and that payment ought not to be demanded for mistakes made in constructing the present tunnel. Testimony for the applicant is that the tunnel is now in need of repairs estimated to cost $1,800,000, or more.

It seems clear that the railroad occupancy of the tunnel is of uncertain character at the present time and that the applicant's announced purpose of operating through the tunnel without paying additional rental is and will be strongly contested by the tunnel district. The building of the cut-off is the chief motive behind the applicant's plan and the applicant desires to accomplish it quickly, but states that the time when construction can be commenced manifestly depends on the decision of the court of appeals and the clearing up of all legal difficulties. Should this final decision invalidate the present lease a new contract would be necessary, and further delay would occur. The tunnel district and tunnel commission, in addition to requesting assurances from the applicant that either the Dotsero cut-off or a western extension from Craig be constructed, ask that we, as a condition precedent to the granting of the application or as a condition of our order, require the applicant to enter into an agreement with the tunnel district for use of the tunnel in connection with Rio Grande operation. The Denver chamber of commerce also asks for such a condition, among others, and requests that the applicant work out a reasonable and satisfactory arrangement for the use of the tunnel, to the end that the present litigation

and public dissatisfaction may cease. In response to questions from one of the State commissioners at the hearing, the applicant's chairman expressed unwillingness to accept any condition calling for the making of a contract with the tunnel commission subject to our approval. He contended that as the tunnel commission would not be bound by any order of this commission, the parties would not be on an equal footing, and that the tunnel commission could not in any event enter into a contract which did not conform to statutory requirements.

In the matter of the Dotsero cut-off, it is stated that the purchase of stock in the Moffat was to facilitate and protect that route and to insure the 1-line operation over it which the applicant deems essential. Little traffic is expected to originate on the cut-off, but the saving of 173 miles in distance between Denver and Dotsero is a consideration of great importance in connection with through traffic. In the proceedings in *Proposed Construction by Denver & S. L. W. R. Co., supra,* the Rio Grande objected to the line being constructed under an arrangement whereby it and the Moffat would interchange traffic at Dotsero, for the reason that the divisions then proposed would not adequately protect the Rio Grande. As has been stated, we found that the public convenience and necessity require the construction and operation of the cut-off, provided trackage-rights operation is performed over it by the Rio Grande. It was ordered that the Rio Grande present the terms of such an operating contract as it desired, and at a stated time thereafter the Moffat submit the terms desired by it. Because of the litigation connected with the tunnel lease, the Moffat obtained an extension of time until July 1, 1930, for the filing of its proposed contract, and negotiations between the carriers were suspended in view of the fact that a trackage contract was dependent on the validity of the tunnel lease and the Moffat's rights thereunder. Since the hearing the time for filing the draft of proposed contract has been further extended to January 1, 1931. The applicant estimates that the cut-off would cost about $3,800,000, and that it would require less than one year to build. The Rio Grande is now handling only 10.5 per cent of the eastbound perishable freight from northern California over its present route and it is testified that a substantial increase in through traffic would follow the shortening of haul afforded by the cut-off. The Rio Grande would expect to retain business in competition with the fast schedules of its transcontinental competitors. The freight traffic moved between Denver and Dotsero over the present line in 1927 was 23,117 carloads, or 487,349 tons, and produced a revenue of $3,459,055. Estimates indicate an increase in this traffic amounting to 19,800 cars, or 363,275 tons, with an increase of $2,100,000 in rev-

enue during the fifth year of operation of the proposed route. A witness for one of the interveners stated that the total interchange traffic of the Rio Grande with eastern connections, viz, the Chicago, Burlington & Quincy, the Union Pacific, and the Chicago, Rock Island & Pacific, was 1,274,991 tons in 1922, and that a large increase in such interchange would take place under this plan. The number of cars just stated is subject to some correction from the fact that not all the movement is through the Denver gateway. With respect to operating expenses, the saving to the Rio Grande in out-of-pocket expense was estimated at $292,023 a year, although it was thought that this would, at the outset, be offset by payments to be made to the Moffat for use of its line and the tunnel. It is expected that there will be improvements to line and to service under the plan.

The assistant general manager of the Denver Union Stock Yard Company furnished information showing the large amount of livestock which is shipped to Denver via Pueblo from counties in western Colorado and in Utah, and the amount shipped from the same counties to Kansas City and other markets east of Denver. Even though the route through Denver to connections at Pueblo was admitted to be longer than via the present line of the Rio Grande, the witness expressed confidence that the proposed route over the cut-off would greatly benefit the shippers of livestock and would effect large savings. The distance to Denver from Rifle, Colo., an important shipping point for livestock on the Rio Grande, would be reduced from 387 miles to 214 miles, the elevation to be overcome would be less, and there would be a considerable saving in time. The witness was strongly in favor of building the cut-off and urged that if we should issue an order authorizing the applicant's proposal a condition to that effect should be prescribed, regardless of the question of a future extension of the Moffat road west from Craig. A witness from Craig expressed the conviction that the cut-off would be built much sooner under Rio Grande control, which would obviate the necessity for negotiations between the two carriers in the matter of operating contracts and divisions.

The intervening petition of the Moffat Tunnel Taxpayers' Association states that, in view of the equitable rights of the taxpayers, the applicant should give assurances that the Dotsero cut-off be built either by it or by the Moffat within 18 months, that the Moffat be continued as an independent line with neutrality as to traffic, and that existing routes and channels of trade and commerce be kept open. A conditional order is desired by this intervener as well as by a witness testifying for the real-estate interests of Denver and by witnesses representing Grand Junction, Colo., Montrose County, Colo., and

other localities. Some take the position that they are not opposed to the Dotsero cut-off if it be built by the Moffat; others object to the cut-off if it means that an extension west from Craig would be prevented. The chairman of the board of the Moffat and one of its voting trustees adheres to the attitude adopted by him in the proceeding in *Proposed Construction by Denver & S. L. W. R. Co., supra*, that the original plan for a western extension or connection should be kept open. The applicant's attitude in this matter is clear. Control of the Moffat is sought for the purpose of developing this short line. The policy of the interests controlling the Rio Grande calls for it and, according to the applicant's chairman, these interests are not going to fail in fulfilling their promises.

The draft of the proposed agreement submitted by the Rio Grande to cover its operation over the cut-off and the Moffat, as already described in connection with Finance Docket No. 4555, was submitted in the present record. While there is no evidence of objection on the part of the Moffat to the terms proposed, this contract is not before us for adjudication as to its fairness and reasonableness and should properly be dealt with in connection with a subsequent proceeding.

Several interveners urged that, along with this proposal, consideration be given to a future line of railroad to extend west from Craig through the Uintah Basin in Utah, which section is now claimed to be inadequately served by existing railroads. Prominent among the parties which demand that the Moffat road be maintained as an open route for the traffic that might come from such a new line, was the Salt Lake & Denver Railroad Company, hereinafter referred to as the Bamberger. The project sponsored by this company, involving the construction of 297 miles of line, was authorized in Utah by the Public Service Commission of that State. It covered a proposed line from Provo, Utah, through the Uintah Basin to Craig. Following the filing of an application with us, recorded in Finance Docket No. 4713, a hearing was held in 1925, and later an examiner's proposed report was issued recommending that the application be denied without prejudice. Contending that the line mentioned would carry out the original intentions of the promoters of the Moffat, the vice president of the Bamberger testified in the instant case that the construction proposed by his company would be prevented by the construction of the Dotsero cut-off, that his line could not pay unless it were operated as a bridge for through traffic, that there is no hope for a railroad through the Uintah Basin unless the Rio Grande voluntarily agrees to it, and that if provision is not made for the equitable use of the Moffat tunnel the Rio Grande will enjoy a monopoly of that facility contrary to the interest of the taxpayers in the

territory. It was suggested that we must now decide whether or not any systems other than the Missouri Pacific and the Union Pacific are to have competitive routes through the central part of the United States, and we are asked to make a ruling as to whether or not the Rio Grande must be protected, irrespective of the needs of the people and industries in the Uintah Basin. Specifically, the Bamberger desires trackage rights over the Moffat line, on terms to be approved by us. The terms set forth in the Rio Grande's proposed agreement for use of the Moffat were mentioned, but the applicant averred that those terms could not be used for the Bamberger. Negotiations with the Moffat, because of its receivership and for other reasons, have been without practical result. It was stated that while the Union Pacific did not object to the Bamberger plan, serious antagonism was displayed by the Rio Grande. In behalf of the Moffat, the only representative of that carrier at the hearing testified that no plans for extending the present line west from Craig had been made, although one of the directors, now not a stockholder, once took an active interest in a western connection, and such connection was always hoped for by the company. The witness felt that nothing should be done to prevent the building of a connecting line by the Bamberger or by any other interest. The Utah commission indorses the Bamberger plan, states that the Uintah Basin is in dire need of transportation, and opposes the applicant's proposal unless it be understood that the granting of the application shall not prejudice the building of a line to serve the basin. The agent of the Uintah-Uray Indian Agency represented that the value of the extensive lands therein would be enormously increased by having a railroad, even though the route proposed by the Bamberger is 30 miles away. The Denver Chamber of Commerce and other interveners urge that we require by a condition of our order that the Moffat road be operated separately and with equality of use, so as to encourage a western connection, and that proper interchange and joint rates be assured.

The opposition to the applicant's proposal expressed by the Moffat Tunnel League and the Uintah Basin Railroad League, organizations which purport to represent, respectively, the western counties in Colorado which are in the tunnel district and the counties in Utah that are interested in a western connection of the Moffat road, is based on the apprehension that service on the Moffat road will be impaired under the plan and that no railroad development west of Craig will be undertaken. The taxpayers in the western part of the district evidently believe that the Moffat would be in a better financial position if left independent, would then extend its lines, and would aid indirectly in strengthening the taxpaying capacity of the people in its territory.

Evidence purporting to show the public interest in a line west from Craig, the resources of that territory, and kindred matters considered immaterial in this case, was generally not admitted at the hearing.

The applicant's position, as expressed by its chairman in regard to a new line west, is one of doubt whether there would be traffic enough to sustain such a line, and there is objection to its being built by the Rio Grande, at least at this time. Reference was made to the desirability of the applicant earning a fair return, to the alleged tendency to lower rates, higher pay, and new forms of competition, and it was contended that the people are interested in maintaining the Rio Grande's credit if good service is desired. The chairman stated, however, that his company would build a new line anywhere, any time, if the traffic would justify it. With reference to another company constructing a railroad west from Craig, the chairman indicated that his people would face that situation when it arose, and that it would be most undesirable for us to require the establishment of free interchange and through rates with a possible western connection without any assurance that the new line, which was alluded to as a competitor, would furnish traffic in return for the concession made. In discussing this matter the chairman pointed out that the territory west of and tributary to Craig would be benefited by the applicant's plan in that a shorter route to Salt Lake City would be provided via the Dotsero cut-off, and it would not be necessary to go back to Denver in order to reach Salt Lake City. In its brief the applicant vigorously objects to conditions such as the interveners desire, mentioning the uncertainties attached to the future railroad under discussion, its route and termini, the reliability of its projectors, the rental terms which would be suitable in a trackage agreement, etc. An attempt to impose conditions in respect of through routes and joint rates would, it is stated, be beyond our jurisdiction, as we have the power to pass upon such questions as controversies arise between existing railroads and not before. The Bamberger is admittedly not in position to enter into a trackage agreement.

The applicant contends that there is practically no traffic competition between the Moffat and itself and discusses the matter at length in its brief, partly for the reason that the constitution and statutes of Colorado prohibit consolidation of competing lines. Touching on this point, certain reports of this commission are quoted to show that the administration of section 5 of the act is not to be considered subject to the limitations of State authority. It is argued that such competition as exists is negligible, and, while the applicable provision of the Colorado constitution has not been construed,

court decisions in other States are cited to show that an actual and substantial amount of competition must exist before there is violation of the antitrust laws, immunity from which is granted by section 5 (8) of the act. If these roads are deemed competitive, then, according to the applicant's argument, virtually all consolidations must cease. In Colorado, the territory involved with the question of competition is that which lies west of Dotsero and Orestod and between the Moffat road on the north and the Rio Grande on the south. The shipping points for this territory are respectively Craig and Rifle, and between them in the White River section lies Meeker, 46 miles from Craig and 42 miles from Rifle. About 300 carloads of livestock are shipped annually from Rifle. The applicant's vice president in charge of traffic testified that there is virtually no competition between the two lines in this section. He stated, however, that service on the Moffat road had improved and traffic nad increased since the tunnel was opened, and that some shippers of livestock who had previously driven their stock to Rifle, even from the vicinity of Craig, had now begun to ship over the Moffat. In regard to grain, his testimony was to the effect that the nearest road would get the business and that there is no railroad competition in this commodity. The applicant's chairman doubted if more than 500 carloads of freight a year came from this territory and the vice president was of opinion that the whole traffic actually in competition would not exceed 50 cars a year. One witness, not testifying for the applicant, stated that the Colorado territory divides about halfway between the two roads, and that livestock traffic moves to each road accordingly. In contrast with the applicant's contentions above stated, witnesses for the interveners testified that keen competition exists between the two lines and that this results in better rail service. A contest in quick handling of livestock destined to Kansas City was said to have been held in the fall of 1929, the result being in favor of the Moffat. It was claimed that horses, hogs, cattle, sheep, wool, gilsonite, oil, and coal are competitive. The existence of grazing land between the two railroads makes it possible to drive cattle to either and, according to this testimony, there is no dividing line for the traffic.

In Utah, west of the Colorado territory just discussed, the communities of Vernal, Duchesne, Myton, and Roosevelt are connected with Price, a point on the Rio Grande, by highways described as being superior to those running to Craig, and the distances, which are very considerable, are shorter to Price. Much of the business in this territory therefore moves to Price, and, in the opinion of the applicant's vice president, there is no competitive traffic between the railroads as that term is commonly understood. Some of the

gilsonite produced in the Uintah Basin is trucked to Price and some to Craig, but most of it seems to be shipped out over the Uintah Railway by the Barber Asphalt Company. A witness for the interveners testified that competition exists as far west as Myton, that wool and livestock move frequently from Vernal to Craig in competition with the Rio Grande, and that a considerable tonnage of gilsonite goes to Craig by truck from the eastern limit of the basin.

As the foregoing outline indicates, the testimony pertaining to competition for traffic is conflicting. That some rivalry exists between the Rio Grande and the Moffat in the western territory of the latter may be conceded, but it does not appear that the character and extent of it are such as to prohibit the granting of this application under section 5 (2), provided the showing of public interest is in other respects adequate.

Permission to intervene in this proceeding was granted to the bondholders' committee of the Rio Grande Southern Railroad Company and to the mine operators and people of Rico, Colo. In their briefs, both these interveners ask that we require the applicant to acquire the Rio Grande Southern. It is a narrow-gage line extending from Durango, on the applicant's system in southwestern Colorado, westerly to Dolores, thence in a general northeasterly direction through Rico to Ridgway, on another line of the applicant, a distance of about 162 miles. Since December 16, 1929, the property has been in receivership. The bondholders' committee, which was formed in 1922 or 1923 and which represents approximately one-third of the outstanding bonds, seeks protection for the property at this time, claiming that the line can not be independently operated. The Western Pacific Railroad Corporation owns approximately 79 per cent of the stock of the Rio Grande Southern, but the applicant explains that, by agreement, the Rio Grande has an indirect and equitable interest in such stock. Deficits in the net railway operating income of the Rio Grande Southern have occurred each year since 1924, the deficit in 1929 being $148,118.29. A general default in the payment of bond interest took place in 1922. The bondholders failing to take any action in aid of the property at the time of the Rio Grande reorganization, the Rio Grande loaned some of its officers and made advances of funds for taxes, maintenance, etc., which aggregate $513,740.47. In addition, the Western Pacific Railroad Corporation has advanced $1,140,267.14 for various purposes. It appears that the Rio Grande has been practically in charge of operation since 1925. To the decline in mining activity on the line is attributed the loss of revenue, and as little new industry seems to be in sight the applicant considers the prospects for the road to be very bad. A serious landslide occurred at Ames, north of

Rico, and after devoting much time and money to removing it in May, 1929, the applicant concluded that the business of the Rio Grande Southern could not possibly justify keeping the line intact at that point. Estimates indicated that it would cost $20,000 to open the slide and $3,000 per month to maintain operation. Traffic was routed accordingly, and rates were adjusted on such ore and other movement as required handling. In addition to the difficulty presented by the slide, there are many old bridges on the line which require repairs. Numerous statistics were introduced by the interveners showing the character of traffic handled, valuation of the property, financial data, agricultural conditions in the district, etc., and testimony as to mining and other industrial features was presented. It is unnecessary to discuss this evidence. Acquisition of control of the Moffat has no connection with the affairs of the Rio Grande Southern. Although we allocated that line to system No. 18, the present time is not appropriate for action providing for the final disposition of the property. Neither the receiver nor the stockholders request such action.

In summarizing the showing of public interest for its plan, the applicant first refers to its accord with our consolidation plan. As to this fact there can be no dispute. With the claim that the proposed acquisition of control will have no adverse effect on existing competition and existing channels of trade, the interveners from the territory west of the Moffat road take issue, as has been hereinbefore explained, while any future railroad connection on the west is considered by them to be doomed by granting the application without conditions. Stating that the Rio Grande is not one of the strong railroads and is handicapped by unremunerative branch lines, largely narrow gage, the applicant argues that anything which tends to strengthen the system must necessarily redound to the public benefit, that the proposed acquisition of control will improve the strength of both roads, especially the Rio Grande's, and that service on both will be bettered.

In discussing the general question of public interest, two of the interveners argue that the applicant's plan will result in placing control of the Moffat line in a very involved state, due to the dual control of the applicant, and that there will be no reduction in the number of corporations. They also say that the purpose of the applicant is to strengthen not the Moffat but itself, and that by a manipulation of divisions the financial condition of the Moffat may be seriously impaired. With respect to the shortening of route proposed through building the Dotsero cut-off, it is claimed that there is no reason to doubt that the Moffat would build the line, and that the safeguarding of the short route so that it will be avail-

able to the Rio Grande is assured by our order in *Proposed Construction by Denver & S. L. W. R. Co., supra.* It is further contended that no benefits in service or in reduction of rates have been offered in any tangible form by the applicant. Finally, the uncertainties surrounding the tunnel lease, involving the possibility of building a new tunnel, are represented to be serious enough to show that the application is premature and that we should not be required to speculate on the outcome of these uncertainties in determining the question of public interest.

Of the many considerations presented in this record the advantage of the applicant's proposal in advancing the consolidation program and in simplifying the construction and operation of the proposed Dotsero cut-off are of outstanding importance. The benefits to be expected from this short route were set forth by us in our report in *Proposed Construction by Denver & S. L. W. R. Co., supra.*

The public interest clearly demands that the cut-off be constructed and brought into operation at the earliest practicable time. Its construction ought not to be dependent on whether any particular interest acquires control of the Denver & Salt Lake, nor be affected by litigation as to the terms under which the tunnel may be used. At the best, construction will probably take many months. It is unthinkable that a dispute as to the terms of user of a great publicly built facility such as the tunnel should be allowed indefinitely to delay an improvement in transportation conditions of the sort the cut-off will afford.

We are of opinion that we should not attempt to enter upon the tunnel controversy, the scope of which is logically confined to the State authorities, the courts, and the carriers.

Upon the facts presented we find that the acquisition by the Denver & Rio Grande Western Railroad Company of control of the Denver & Salt Lake Railway Company by purchase of capital stock or its equivalent in voting-trust certificates, as described in the application, will be in the public interest, and that the terms and conditions under which said stock is to be acquired and the consideration to be paid therefor are just and reasonable; subject, however, to the following express conditions: (1) That the Denver & Rio Grande Western Railroad Company shall purchase for cash, at not exceeding $155 a share, any shares of capital stock and/or voting-trust certificates of the Denver & Salt Lake Railway Company which may be offered to it for purchase within six months after the date of the order to be entered herein; (2) that the Denver & Rio Grande Western Railroad Company, through the Denver & Salt Lake Railway Company, will establish such through routes in connection with any western connection hereafter constructed under our authority

as we may find in a subsequent proceeding or proceedings to be reasonable and in the public interest; and (3) that the Denver & Rio Grande Western Railroad Company, through the Denver & Salt Lake Railway Company, shall commence the construction of the Dotsero cut-off within six months from the date of any order to be entered herein, authorizing the proposed acquisition, and shall complete such construction within two years after beginning it.

No order will be entered at this time. Prior to the entry of any order authorizing the proposed acquisition the applicant shall file with us, for our approval, its unqualified acceptance of the conditions herein prescribed. For the purpose of considering such acceptance, if filed, the proceeding will be held open for 90 days.

LEE, *Commissioner*, concurring specially:

I concur generally in the approval of the application of the Rio Grande to acquire the Denver & Salt Lake on the conditions set forth in the report. It may be said, however, that every consideration of public interest requires that the greatest possible use be made of the Moffat tunnel. For many years the urgent need for this tunnel was recognized, but the railroads, apparently because of the large financial burden which would be entailed, did not undertake its construction. While there is no evidence before us on which we could formally determine the advisability of a "neighboring" tunnel, it is incredible that anyone would seriously entertain the thought of constructing another tunnel in the immediate vicinity until the existing facility shall have attained its fullest use. But the evidence does tend to the conclusion that the public interest would be best promoted through the payment of a reasonable rental by the carriers which use the tunnel, to the end that its cost ultimately may be repaid, in so far as possible, by those interests directly benefited. However, any right of the Denver & Salt Lake, growing out of the contract with the tunnel district, is now the subject of litigation in the courts. Likewise, any power of the Denver & Salt Lake to grant the Rio Grande the right to use the tunnel depends on a judicial interpretation of the contract. Under these circumstances, it would seem improper for us to require the Rio Grande, as a condition precedent to our approval of its application, to obtain permission for the use of the tunnel.

EASTMAN, *Commissioner*, dissenting:

In my judgment, it has not been shown that acquisition of control of the Denver & Salt Lake by the Denver & Rio Grande Western is in the public interest. Plainly the essential thing, so far as the public interest is concerned, is that the new direct route between

Denver and the western territory beyond, involving the use of the tunnel constructed at great public expense, shall be developed and utilized to the fullest extent. It is not clear to me that this result will be attained by giving the Denver & Rio Grande Western control of this route. The Missouri Pacific owns 50 per cent of the stock of that carrier and thus has at least a veto power over its management. In this proceeding the Missouri Pacific assumed throughout the leadership on behalf of the applicant, with the other half owner, the Western Pacific, in the background.

The Missouri Pacific does not serve Denver as a freight carrier. It has no direct interest in the development of Denver as a gateway to and from the western territory beyond. Its connection with the Denver & Rio Grande Western is at Pueblo, and full development and utilization of the new direct route through the Denver gateway would affect adversely its route through Pueblo.

On the other hand, the evidence indicates that the Denver & Salt Lake, if it were allowed to remain as an independent carrier, would be in a reasonably strong position. Its earnings are now good enough, if the majority are right, to justify the payment of $155 per share for its common stock. At its eastern end, it connects with the Union Pacific, the Burlington, and the Rock Island, the last two roads, particularly the strong Burlington system, having no adverse interest which conflicts with the development of the new Denver route. At its western end, it is to be connected, by a comparatively small expenditure and under authority which we have already granted, with the Denver & Rio Grande Western, and there is also the possibility of an extension west from Craig to Salt Lake City. This was a part of the original project, and it is not to be dismissed as an impracticable plan, particularly if one of the eastern connections of the Denver & Salt Lake should be interested in it. As an independent carrier, also, the Denver & Salt Lake would, I believe, be in a better positon to negotiate divisions with connections than if it becomes a minor satellite of the Missouri Pacific system.

I can see nothing to be gained, therefore, by turning the Denver & Salt Lake over to the Denver & Rio Grande Western, with its Missouri Pacific affiliations. The likelihood is rather that something of importance will be lost. It impresses me as being, from the public point of view, ill-advised action lacking in foresight.

If, however, applicant is to have the Denver & Salt Lake, the conditions imposed by the majority could be improved. The condition that the Denver & Salt Lake shall "establish such through routes in connection with any western connection hereafter constructed under our authority as we may find in a subsequent proceeding or

proceedings to be reasonable and in the public interest" is good, so far as it goes; but to protect this situation as adequately as possible existing eastern connections should also have been included in the condition. A further condition is desirable, to the effect that if the present lease of the tunnel is hereafter declared invalid, applicant will, through the Denver & Salt Lake, agree to execute a new lease, if one can be obtained, upon such terms as we may find to be just and reasonable. This is necessary to protect the public interest in this tunnel constructed at great public expense, if the Missouri Pacific system is to be allowed to dominate, or exercise a veto power over, the Denver & Salt Lake. The evidence shows hostility to the tunnel upon the part of the Missouri Pacific, and even a threat to build a new tunnel unless it can secure the lease of the one which now exists upon its own terms.

COMMISSIONER BRAINERD did not participate in the disposition of this case.

[fol. 41] MEMORANDUM

Exhibit "D", referred to in Paragraph VI, page 5, fifth line, of the bill of complaint, being transcript of all evidence introduced at hearings before the Interstate Commerce Commission, Docket 8070, by reason of its bulk is not attached here but accompanies this record as a separate document.

[fol. 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed Nov. 11, 1931

The Interstate Commerce Commission, defendant in the above-entitled suit, hereinafter referred to as the Commission, now and at all times saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the plaintiffs' complaint contained, for answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering the opening paragraph and paragraphs I to V, inclusive, of the plaintiffs' complaint, the Commission admits for the purposes of this suit that the allegations therein contained are true, except that the Commission de-[fol. 43] nies the allegations of paragraph I that the plaintiffs are legal entities or are citizens or residents, respectively, of the states of Colorado and Utah, or that the plaintiffs have, or either of them has, any capacity, power, right or authority to bring this suit. The Commission further denies that this court has authority as a District Court of general equity jurisdiction to entertain this suit, and alleges that this being a suit to set aside an order of the Interstate Commerce Commission, it can be heard only pursuant to the provisions of the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 220, which jurisdiction is not invoked by the complaint herein.

II

Answering paragraphs VI to XI, inclusive, of the complaint, the Commission admits and alleges that it made, entered and served upon all parties to the Commission proceeding the report of December 2, 1930, and the supplemental report and order of September 15, 1931, a true copy of said report being attached to the complaint herein as Exhibit C, and a true copy of said supplemental report and order being attached to the complaint herein as Exhibit B thereto. The Commission further admits and alleges that said reports and order above referred to were issued by the Commission pursuant to an application presented by the Denver & Rio Grande Western Railroad Company, defendant herein, in a proceeding designated Finance Docket No. 8070, Denver & Salt Lake Railway Company Control, said application being based upon paragraph 2 of Section 5 of Title 49, U. S. Code; and the Commission admits and alleges that prior to the making, entering and serving of said reports and order as aforesaid it accorded to the parties to said proceeding, including the plaintiffs herein, the full hearings provided for in the Interstate Commerce Act; that [fol. 44] at said hearings a large volume of testimony and other evidence bearing upon the matters covered by the said reports and order were submitted to the Commission for consideration on behalf of said parties, including the plaintiffs herein, by their respective counsel; that at said hearings questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, whereupon the Commission determined said matters and made and entered said reports and order which included the Commission's decisions, conclusions, order, requirements and conditions in the premises; that upon the evidence before it, and as shown in said reports, the Commission made the findings and stated the conclusions upon which said reports and order are based.

The Commission further alleges that said findings and conclusions were and are, and that each of them was and is, fully supported and justified by the evidence before the Commission in said proceeding.

Further answering paragraph VI of the complaint, the Commission denies that it, through its examiner, excluded

any evidence whatever which was competent, relevant or material to the issues involved in said proceeding, and the Commission further denies that it made its reports and entered its order in said proceeding without a legal hearing, but on the contrary alleges that it held a hearing which fully complied in all respects with the Interstate Commerce Act.

Further answering paragraph VI of the complaint, the Commission denies that Exhibit D, attached to the complaint herein, is either a full, true or correct transcript of [fol. 45] all the evidence before the Commission bearing upon the matters referred to in said paragraph of the complaint, denies that said paragraph VI contains a full, true or correct statement of the matters upon which evidence was offered to and rejected by the Commission examiner in the hearing, and denies that evidence upon the matters set out in said paragraph VI, subparagraphs (1) to (13), inclusive, of the complaint would have been material or pertinent to the issues before the Commission.

Further answering paragraph VII of the complaint, the Commission disclaims information sufficient to form a belief as to the truth of the allegations in said paragraph contained, relative to announcements or statements of the officers of the defendant Denver & Rio Grande Western Railroad Company, and the Commission, therefore, neither admits nor denies that said allegations are true, but it alleges and states that the allegations of said paragraph VII, even if true, are irrelevant and impertinent to any issue in this case.

Further answering paragraph VIII of the complaint, the Commission denies that its reports and order in the aforesaid proceeding are unsupported by evidence or that they are either illegal, null, or void for the reasons alleged by the plaintiffs herein or for any other reason.

Further answering paragraph IX of the complaint, the Commission alleges and states that the allegations of said paragraph with respect to the need or necessity for a railroad extending westward from the western terminus of the Denver & Salt Lake Railway at Craig, Colo., to Provo or Salt Lake City, Utah, are irrelevant and impertinent to the issues in said case, and therefore, the Commission neither admits nor denies that said allegations are true.

[fol. 46] The Commission further alleges that in making said reports and order it considered and weighed carefully in the light of its own knowledge and experience each material fact, circumstance and condition called to its attention on behalf of the parties to the proceeding by their respective counsel, including all matters covered by the allegations of the complaint herein.

The Commission further alleges that in making said order and in determining that it had jurisdiction to do so, it did not act either arbitrarily or unjustly or contrary to the relevant evidence, or without evidence to support its action and jurisdiction in the premises; that in making said reports and order the Commission did not exceed the authority which had been duly conferred upon it by law or exercise that authority in an unreasonable manner, and the Commission denies each of and all the allegations to the contrary contained in the complaint.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in said complaint so far as they conflict either with the allegations herein or with the statements or conclusions of fact included in said reports and order of the Commission, which are hereby referred to and made a part hereof.

Further answering the complaint, the Commission denies that the compliance by defendant Denver & Rio Grande Western Railroad Company with the terms of said certificate and order of the Commission will cause irreparable damage or any damage or injury whatever to the plaintiff's or to any interest legally represented by them.

[fol. 47] All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct, and prays that this complaint in equity be dismissed.

III

Further answering said complaint, and as and for a separate defense thereto, the Commission alleges that the plaintiffs are without the standing or capacity to institute and maintain this suit.

Wherefore the Commission prays that the complaint in equity be dismissed and prays that an appropriate order and decree to that end may be entered.

Interstate Commerce Commission, by Nelson Thomas, Attorney, Interstate Building, Washington, D. C. Daniel W. Knowlton, of Counsel.

[fol. 48] *Duly sworn to by Ezra Brainerd, Jr. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 49] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, DEFENDANT—Filed Nov. 12, 1931

Comes now defendant The Denver and Rio Grande Western Railroad Company, and moves the court to dismiss the petition herein (denominated "Complaint in Equity"), and for grounds of this motion, alleges:

1. That the said petition does not state facts sufficient to constitute a cause of action.

2. That the said petition does not state facts sufficient to constitute a cause of action against this defendant.

3. That said petition is defective and insufficient in that it appears that all of the evidence upon which the defendant Commission made its report (Exhibit C to the petition) and its supplemental report and its order (Exhibit B to the petition) is not attached to and made a part of the petition, [fol. 50] in this respect, among others: While the petition alleges that Exhibit D attached thereto is a transcript of all of the evidence introduced at the hearings before the Commission "bearing upon the matters herein involved," it affirmatively appears from said transcript (Exhibit D) that various exhibits were introduced by applicant (this defendant) and other parties at such hearings, and made a part of the record, and material to the questions involved in the

proceeding before said Commission; but the same are not attached to the petition or to said transcript, Exhibit D.

4. That while it is alleged in said petition that no hearing on the question whether the acquisition prayed for by this defendant in I. C. C. Finance Docket 8070 referred to therein, "will be in the public interest," it affirmatively appears from the complaint and Exhibit D attached thereto that such hearing was had by defendant Commission.

5. That the facts alleged in the petition are not sufficient to overcome the presumption that the reports, findings and order of the Commission (Exhibits B and C to the petition) were based on sufficient evidence and are valid; on the contrary it affirmatively appears from the petition and the exhibits attached thereto, that such reports, findings and order were based on sufficient evidence and are valid.

(Sgd.) Clarence A. Southerland, Solicitor for Defendant The Denver and Rio Grande Western Railroad Company. (Sgd.) Winslow S. Pierce, (Sgd.) Henry McAllister, of Counsel.

[File endorsement omitted.]

[fol. 51] In United States District Court

[Title omitted]

Answer of United States of America—Filed Nov. 14, 1931

First Defense

United States, one of the defendants in the above-entitled cause, for its First Defense to the complaint therein filed says:

(a) The plaintiffs are without legal or other valid right under the act invoked by the complaint, or under any other law, to maintain this suit against the United States.

(b) The complaint is without equity on its face and the facts therein alleged are insufficient to constitute a cause of action against the United States.

(c) The statements and allegations of fact contained in the complaint are insufficient to show that the order of the Interstate Commerce Commission causes or will cause plaintiffs to suffer such legal damage as would entitle them to the injunctive relief prayed in the complaint.

[fol. 52] Wherefore United States moves to dismiss the complaint and prays that an appropriate order may be entered.

Second Defense

United States, for its Second Defense to the complaint, answers and says:

I

United States admits, for the purposes of this suit, that the allegations contained in the opening paragraph and paragraphs I to V, inclusive, with these exceptions:

(a) United States denies that plaintiffs are legal entities or are citizens or residents, respectively, of the States of Colorado and Utah, and denies also that plaintiffs have, or either of them has, any capacity, power, right or authority to bring this suit.

(b) United States denies that this Court has authority as a district court of general equity jurisdiction to entertain this suit, and alleges that, being a suit to enjoin, annul, set aside and suspend an order of the Interstate Commerce Commission, it can be heard only pursuant to the provisions of Urgent Deficiencies Act (38 Stat. 219).

II

Answering paragraph VI of the complaint, United States admits that defendant, Denver & Rio Grande Western Railroad Company, made application to the Interstate Commerce Commission under paragraph 2 of Section 5 of the Interstate Commerce Act for authority to acquire control of the Denver and Salt Lake Railway Company by purchase of the majority of the capital stock of the latter com-[fol. 53] pany, but United States denies all the remaining allegations of said paragraph VI, except that it admits that certain testimony tendered and offered at the hearing conducted by said Commission was by it rejected on the ground that it was immaterial to the matters pending in said application before the Commission in said hearing, but United

States denies that the proffered testimony so rejected by the Commission was relevant, material or competent to the matters then pending at said hearing, and further denies that the rejection of the testimony so offered rendered the hearing conducted by the Commission inadequate, incomplete, arbitrary or otherwise unlawful or insufficient to constitute a full and adequate hearing.

Further answering said paragraph VI, United States denies that Exhibit D to the complaint herein contains a transcript of all the evidence introduced at said hearings bearing upon the matters involved in said complaint, and further denies that said paragraph VI contains a full, true or correct statement of the matters upon which evidence was offered to and rejected by the Commission in said hearing, and denies also that evidence upon the matters set forth in sub-paragraphs 1 to 13, inclusive, of said paragraph VI of the complaint would have been material or pertinent to the issues then pending before the Commission; and United States alleges that some of the proffered testimony, particularly that described in sub-paragraphs 11, 12 and 13 of said paragraph VI, was cumulative in that substantially the same testimony had already been heard and received of record by the Commission in said hearing.

Further answering said paragraph VI, United States particularly denies that said Commission made its reports and entered its order in the proceeding described in said paragraph without a legal hearing, and alleges that the [fol. 54] hearing held and conducted by the Commission fully complied in all respects with the requirements of the Interstate Commerce Act, and with the rights of all parties to the proceeding arising from any other act or law.

III

United States disclaims any knowledge or information concerning the allegations contained in paragraph VII of the complaint; and, therefore, neither admits nor denies said allegations, but alleges that the facts therein alleged, even if true, have no bearing upon the validity of said order of the Commission.

IV

United States denies the allegations made and contained in paragraph VIII of the complaint.

V

For answer to paragraph IX of the complaint, United States denies that the matters, things and conclusions therein alleged are relevant or material to the issues laid by the complaint; and alleges that the matters and things so alleged are irrelevant, incompetent and immaterial to the issues in this case, are based on speculation, and are not susceptible of proof, but, United States alleges that even if said allegations were true, they have no bearing upon the question whether said order is valid and lawful, but are matters for consideration by said Commission in its capacity as an administrative body, and may not be considered by this Court sitting in judicial review of said order, and United States, therefore, neither admits nor denies said allegations of said paragraph IX.

[fol. 55] VI

United States denies each and every allegation made and contained in paragraph X of the complaint; and particularly denies that any irreparable or other legal damage or injury will result to the plaintiffs, or to any one else, from said order made and entered by the Commission in said proceeding.

VII

Except as herein expressly admitted, United States denies the truth of each and every allegation made and contained in the complaint.

Wherefore, having fully answered the complaint, United States prays that the relief therein sought be denied, and that the complaint be dismissed at the costs of the plaintiffs, and that it have such other and further orders, decrees and relief as may be just and proper.

Elmer B. Collins, Special Assistant to the Attorney General. John Lord O'Brian, Assistant to the Attorney General. Leonard E. Wales, United States Attorney.

[fols. 56-65] *Duly sworn to by Elmer B. Collins Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 66] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE DENVER AND SALT LAKE RAILWAY COMPANY—Filed Dec. 12, 1931.

The Denver and Salt Lake Railway Company, intervener herein by leave of Court first had and obtained, now and at all times saving and reserving to itself all benefit and advantage of exception to the many errors and insufficiencies in the Bill of Complaint, for answer thereto, or to so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

[fol. 67] I

Answering the opening paragraph and paragraphs I to V, inclusive, of the complaint, this defendant admits the allegations thereof, except that it denies that the plaintiffs, or either of them, is a legal entity, or a citizen, or a resident of the State of Colorado, or of the State of Utah, or of any other state or territory, and denies that the plaintiffs have, or that either of them has, any capacity, right or authority to institute or maintain this suit, either on their own account or on behalf of any party or parties whom they purport to represent, and denies that the plaintiffs, or either of them, was a party in interest in Finance Docket 8070 before The Interstate Commerce Commission, and denies that the plaintiffs, or either of them, has any pecuniary, property or legal interest in the order sought to be enjoined herein, and denies the accuracy of Exhibit A, attached to the complaint, in respect to the location of the Moffat Road.

II

Answering paragraph VI, this defendant admits that the application of the defendant, The Denver and Rio Grande Western Railroad Company in Docket 8070, was based upon paragraph 2 of section 5 of title 49 U. S. Code, and denies each and every other allegation in said paragraph contained, and alleges that much of the evidence rejected by the Examiner, particularly such as is referred to in sub-paragraphs 11, 12 and 13 of paragraph VI, was cumulative, in

that substantially the same testimony was offered by the [fol. 68] plaintiffs and admitted by the Examiner. This defendant further alleges that the Interstate Commerce Commission had, prior to the hearing in Docket 8070, held two other and separate hearings involving the Dotsero Cutoff and the proposed construction of a line of railroad between Craig and Salt Lake City, the former being Docket 4555 and the latter being Docket 4713, and as appears from the record Exhibit D to the complaint, both of said cases were pending and undecided at the time of the hearing in Docket 8070; the matters involved in the alleged rejection of testimony and offers of proof were purely speculative and involved mere hopes and desires and were of such nature as not to admit of proof; all pertinent matters relating to the Moffat Tunnel were fully presented to the Commission by a witness called on behalf of The Moffat Tunnel Improvement District, an Intervener in the proceeding before the Commission.

III

This defendant denies each and every allegation contained in paragraph VII of the complaint and alleges that the allegations contained in said paragraph of the complaint are wholly immaterial to any issue herein.

IV

This defendant denies each and every allegation contained in paragraph VIII of the complaint.

V

Answering paragraph IX, this defendant shows to the Court that each and all of the allegations therein contained are immaterial and irrelevant, because the validity of the order of The Interstate Commerce Commission must be [fol. 69] tested only by the record of the proceedings of the Commission, and not by independent and collateral assertions or allegations with respect to matters covered in said paragraph, and while protesting that no legal issue is made by any allegation therein, this defendant makes answer thereto as follows: Admits that some communities and businesses in the territory referred to are entirely dependent on the Moffat Road for railroad facilities, but denies that the plaintiffs, or either of them, has any capacity or legal

right to represent said communities or businesses in this proceeding; this defendant is without knowledge or information as to whether any promises have been made by others with respect to the extension of the Moffat Road westward from Craig, but denies that any such promise has ever been made by this defendant; denies that the control of the Moffat Road by The Denver and Rio Grande Western Railroad Company will result in either delaying or preventing the extension of the Moffat Road westward from Craig, or that such control will result either in hampering or restricting the Moffat Road in furnishing railroad facilities to the communities referred to in said paragraph; admits that The Moffat Tunnel Improvement District was created and the Moffat Tunnel was constructed to improve railroad facilities of the Moffat Road and to encourage a westward connection, or connections, with said road, either by means of the Dotsero Cutoff or an extension west of Craig, or both; admits that the Moffat Tunnel Improvement District has issued bonds for several million [fol. 70] dollars, which are a lien upon the lands in said District, and that all of the lands of Grand, Routt and Moffat Counties are within said District, and alleges that all of the lands in the City and County of Denver and part of the lands of several other counties are also within said District; denies each and every other allegation in said paragraph contained.

VI

This defendant denies each and every allegation in paragraph X of the complaint.

VII

This defendant denies each and every allegation in the complaint contained, not herein expressly admitted.

VIII

For a further answer and separate defense to the complaint, this defendant alleges:

(a) That the plaintiffs have no capacity to institute or maintain this suit.

(b) That the complaint does not state facts sufficient to constitute a cause of action.

(c) That the complaint does not show any actual or threatened legal injury or damage to the plaintiffs, or either of them.

(d) That the plaintiffs have no legal right or lawful authority to maintain this action under the act invoked, nor under any other law.

Wherefore, having fully answered the complaint, this defendant prays that it be dismissed, and for such other relief as may be appropriate.

(Sgd.) Elmer L. Brock, (Sgd.) Dudley C. Lunt, Solicitors for the Denver and Salt Lake Railway Company.

[fols. 71-267] *Duly sworn to by W. R. Freeman. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 268] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF DEFENDANT THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY—Filed Jan. 20, 1932

Comes now The Denver and Rio Grande Western Railroad Company (herein sometimes called defendant Railroad Company), one of the defendants in the above entitled cause, and for answer to the complaint herein, says and alleges:

I

For its first defense:

1. The plaintiffs are without legal or other valid right under the Act invoked by the complaint, or under any other law, to maintain this suit against this defendant.

2. The complaint is without equity on its face and the facts therein alleged are insufficient to constitute a cause of action against this defendant.

3. The statements and allegations of fact contained in the complaint are insufficient to show that the order of the Interstate Commerce Commission causes or will cause plain-

tiffs to suffer such legal damage as would entitle them to the injunctive relief prayed for in the complaint.

[fol. 269] Wherefore this defendant moves to dismiss the complaint.

II

For its second defense:

1. For the purposes of this suit, this defendant admits the allegations contained in the introductory paragraph and paragraphs I to V, inclusive, of the complaint, with these exceptions:

(a) This defendant denies that plaintiffs are legal entities or are citizens or residents, respectively, of the States of Colorado and Utah, and denies also that plaintiffs have, or either of them has, any capacity, power, right or authority to bring this suit.

(b) This defendant denies that this court has authority as a district court of general equity jurisdiction, to entertain this suit, and alleges, being a suit to enjoin, annul, set aside and suspend an order of the Interstate Commerce Commission, it can be heard only pursuant to the provisions of Urgent Deficiencies Act (38 Stat. 219); the same being U. S. Code, Title 28, Secs. 43-48.

2. Answering paragraph VI of the complaint, this defendant admits that it made application to the Interstate Commerce Commission under paragraph 2 of Section 5 of the Interstate Commerce Act, for authority to acquire control of The Denver and Salt Lake Railway Company (herein called the Salt Lake Company) by purchase of the majority of the capital stock of that company, but this defendant Railroad Company denies all the remaining allegations of said paragraph VI, except that it admits that certain testimony tendered and offered at the hearing conducted by said Commission was by it rejected on the ground that it was immaterial to the matters pending in said application before the Commission, but this defendant Railroad Company denies that the proffered testimony so rejected by the Commission, was relevant, material or competent to the matters then pending at said hearing, and further denies that the rejection of the testimony so offered, rendered

[fol. 270] the hearing conducted by the Commission inadequate, incomplete, arbitrary or otherwise unlawful or insufficient to constitute a full and adequate hearing.

Further answering said paragraph VI, the defendant Railroad Company denies that Exhibit D to the complaint herein contains a transcript of all the evidence introduced at said hearing bearing upon the matters involved in said complaint, and further denies that said paragraph VI contains a full, true and correct statement of the matters upon which evidence was offered to and rejected by the Commission in said hearing, and denies also that evidence upon the matters set forth in sub-paragraphs 1 to 13, inclusive, of said paragraph VI of the complaint would have been material or pertinent to the issues then pending before the Commission; and this defendant Railroad Company alleges that some of the proffered testimony, particularly that described in sub-paragraphs 11, 12 and 13 of said paragraph VI, was cumulative in that substantially the same testimony had already been heard and received of record by the Commission in said hearing; and further this defendant Railroad Company alleges that there were various exhibits presented at said hearing by this defendant Railroad Company, as the applicant, and by other parties to said proceeding, which were relevant and material to the matters then pending at said hearing and which constituted a part of the record in said proceeding, and which have not been incorporated in Exhibit D attached to the complaint.

Further answering said paragraph VI, this defendant Railroad Company particularly denies that said Commission made its reports and entered its order in the proceeding described in said paragraph without a legal hearing, and alleges that the hearing held and conducted by the Commission fully complied in all respects with the requirements of the Interstate Commerce Act, and with the rights [fol. 271] of all parties to the proceeding arising from any other act or law.

3. This defendant Railroad Company denies the allegations made and contained in paragraph VIII of the complaint.

4. For answer to paragraph IX of the complaint, this defendant Railroad Company denies that the matters, things and conclusions therein alleged are relevant or

material to the issues alleged by the complaint; and alleges that the matters and things so alleged are irrelevant, incompetent and immaterial to the issues of this case, are based on speculation and are not susceptible of proof. But it alleges that if said allegations were true they have no bearing upon the question whether said order of the Commission is valid and lawful, but are matters for consideration by the Commission in its capacity as an administrative body and may not be considered by this court sitting in judicial review of said order; therefore this defendant Railroad Company neither admits nor denies the allegations of said paragraph IX, except it denies that the control of the railroad of the Salt Lake Company, by this defendant will or would result in hampering and restricting the Salt Lake Company in furnishing railroad facilities to the communities now served by it.

5. This defendant Railroad Company denies each and every allegation contained in paragraph X of the complaint, and particularly denies that any irreparable or other legal damage or injury will result to the plaintiffs from said order made and entered by the Commission in said proceeding.

Wherefore, having fully answered the complaint, this defendant Railroad Company prays that the relief therein [fol. 272] sought be denied, that the complaint be dismissed at the cost of the plaintiffs. and that it shall have such other and further orders, decrees and relief as may be just and proper.

The Denver and Rio Grande Western Railroad Company, by C. A. Southerland, Its Solicitor. Henry McAllister, Jr., Winslow S. Pierce, H. Brua Campbell, of Counsel.

[fol. 273] *Duly sworn to by H. Brua Campbell. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 274] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE MOFFAT TUNNEL IMPROVEMENT DISTRICT, A BODY CORPORATE UNDER THE LAWS OF THE STATE OF COLORADO; HERBERT C. FAIRALL, W. N. W. BLAYNEY, CHARLES J. WHEELER, CHARLES H. LECKENBY, AND GEORGE P. SCHUMACKER, AS MEMBERS OF AND CONSTITUTING THE MOFFAT TUNNEL COMMISSION—Filed Jan. 20, 1932

First Defense

The Moffat Tunnel Improvement District, a body corporate under the laws of the State of Colorado, Herbert C. Fairall, W. N. W. Blayney, Charles J. Wheeler, Charles H. Leckenby, and George P. Schumacker, as members of and constituting the Moffat Tunnel Commission, interveners in the above entitled cause, for their first defense to the complaint therein filed, say:

[fol. 275] 1. The plaintiffs are without legal or other valid rights, or under any law to maintain this suit against the defendants.

2. The complaint is without equity on its face and the facts therein alleged are insufficient to constitute a cause of action against the defendants.

3. The allegations of fact contained in the complaint are insufficient to show that the order of the Interstate Commerce Commission causes or will cause plaintiffs to suffer such legal damages as would entitle them to the injunctive relief prayed for in the complaint.

Wherefore these interveners move to dismiss the complaint and pray that an appropriate order may be entered.

Second Defense

These interveners, for their second defense to the complaint, answer and say:

1. These interveners, for the purposes of this suit, admit that the allegations contained in the opening paragraph

and paragraphs I to V inclusive, with the following exceptions:

(a) These interveners deny that plaintiffs are legal entities or are citizens or residents respectively of the states of Colorado and Utah and deny that plaintiffs have, or either of them has any capacity, power, right or authority to bring this suit.

(b) These interveners deny that this court has authority as a district court of general equity jurisdiction, to entertain this suit, and allege that, being a suit to enjoin, annul, set aside and suspend the order of the Interstate Commerce [fol. 276] Commission, which can be heard only pursuant to the provisions of Urgent Deficiencies Act (38 Stat. 219).

2. Answering paragraph VI of the complaint, these interveners admit that defendant, Denver & Rio Grande Western Railroad Company, made application to the Interstate Commerce Commission under Paragraph 2 of Section 5 of the Interstate Commerce Act for authority to acquire control of the Denver & Salt Lake Railway Company by purchase of the majority of the stock of the latter company, but interveners deny all the remaining allegations of said paragraph VI, except that they admit that certain testimony tendered and offered at the hearing conducted by said Commission was by it rejected on the ground that it was immaterial to the matters pending in said application before the Commission in said hearing, but interveners deny that the proffered testimony so rejected by the Commission was relevant, material or competent to the matters then pending at said hearing, and further deny that the rejection of the testimony so offered rendered the hearing conducted by the Commission inadequate, incomplete, arbitrary or otherwise unlawful or insufficient to constitute a full and adequate hearing.

Further answering said paragraph VI, these interveners deny that Exhibit D to the complaint herein contains a transcript of all the evidence introduced at said hearings bearing upon the matters involved in said complaint, and further deny that said paragraph VI contains a full, true or correct statement of the matters upon which evidence was offered to and rejected by the Commission in said hearing, and deny also that evidence upon the matters set forth in sub paragraphs 1 to 13, inclusive, of said paragraph VI of

[fol. 277] the complaint would have been material or pertinent to the issues then pending before the Commission; and these interveners allege that some of the proffered testimony, particularly that described in sub-paragraphs 11, 12 and 13 of said paragraph VI, was cumulative in that substantially the same testimony had already been heard and received of record by the Commission in said hearing.

Further answering said paragraph VI, these interveners particularly deny that said Commission made its reports and entered its order in the proceeding described in said paragraph without a legal hearing, and allege that the hearing held and conducted by the Commission fully complied in all respects with the requirements of the Interstate Commerce Act, and with the rights of all parties to the proceeding arising from any other act or law.

3. These interveners disclaim any knowledge or information concerning the allegations contained in paragraph VII of the complaint; and, therefore, neither admit nor deny said allegations, but allege that the facts therein alleged, even if true, have no hearing upon the validity of said order of the Commission.

4. These interveners deny the allegations made and contained in paragraph VIII of the complaint.

5. For answer to paragraph IX of the complaint, these interveners deny the matters, things and conclusions therein alleged are relevant or material to the issues laid by the complaint; and allege that the matters and things so alleged are irrelevant, incompetent and immaterial to the issues [fol. 278] in this case, are based on speculation, and are not susceptible of proof; but, these interveners allege that even if said allegations were true, they have no bearing upon the question whether said order is valid and lawful, but are matters for consideration by said Commission in its capacity as an administrative body, and may not be considered by this Court sitting in judicial review of said order, and these interveners, therefore, neither admit nor deny said allegations of said paragraph IX.

6. These interveners deny each and every allegation made and contained in paragraph X of the complaint; and particularly deny that any irreparable or other legal damage or injury will result to the plaintiffs, or to any one else,

from said order made and entered by the Commission in said proceeding.

7. Except as herein expressly admitted, these interveners deny the truth of each and every allegation made and contained in the complaint.

Wherefore, having fully answered the complaint, these interveners pray that the relief therein sought be denied, and that the complaint be dismissed at the costs of the plaintiffs, and that they have such other and further orders, decrees and relief as may be just and proper.

(Sgd.) Howard Duane, (Sgd.) Norton Montgomery,
Attorneys for Interveners.

[fol. 279] *Duly sworn to by Norton Montgomery. Jurat* omitted in printing.

[File endorsement omitted.]

[fol. 280] In United States District Court

[Title omitted]

Answer of State of Colorado ex Rel. the Public Utilities Commission of the State of Colorado and Worth Allen, Dan S. Jones, and Edward E. Wheeler, the Members of Said Commission—Filed Jan. 20, 1932

First Defense

The State of Colorado, intervener in the above entitled cause, for its First Defense to the Complaint filed therein, says:

(a) The plaintiffs are without legal or other valid right under the Act invoked by the Complaint or under any other law to maintain this suit.

(b) The Complaint is without equity on its face and the facts therein alleged are insufficient to constitute a cause of action.

(c) The statements and allegations of fact contained in the Complaint are insufficient to show that the order of the Interstate Commerce Commission causes or will cause

[fol. 281] plaintiffs to suffer such legal damage as would entitle them to the injunctive relief prayed in the Complaint.

Wherefore State of Colorado moves to dismiss the Complaint and prays that an appropriate order may be entered.

Second Defense

State of Colorado, intervener, for its Second Defense to the Complaint, answers and says:

I

Admits, for the purposes of this suit, the allegations contained in the opening paragraph and paragraphs I to V inclusive, with these exceptions:

(a) Denies that plaintiffs are legal entities or are citizens or residents respectively of the states of Colorado and Utah, and denies also that plaintiffs have, or either of them has, any capacity, power, right or authority to bring this suit.

(b) Denies that this court has authority as a district court of general equity jurisdiction to entertain this suit, and alleges that being a suit to enjoin, annul, set aside and suspend an order of the Interstate Commerce Commission, it can be heard only pursuant to the provisions of Urgent Deficiencies Act (38 Stat. 219).

II

Answering Paragraph VI of the Complaint, admits that defendant, The Denver and Rio Grande Western Railroad Company, made application to the Interstate Commerce Commission under Paragraph 2 of Section 5 of the Interstate Commerce Act for authority to acquire control of the Denver and Salt Lake Railway Company by purchase of the majority of the stock of the latter company, but denies all of the remaining allegations of said Paragraph VI, except that it admits that certain testimony tendered and offered at the hearing conducted by said Commission was [fol. 282] by it rejected on the ground that it was immaterial to the matters pending in said application before the Commission in said hearing, but denies that the proffered testimony so rejected by the Commission was relevant, material and competent to the matters then pending at

said hearing, and further denies that the rejection of the testimony so offered rendered the hearing conducted by the Commission inadequate, incomplete, arbitrary or otherwise unlawful or insufficient to constitute a full and adequate hearing.

Further answering said Paragraph VI, denies that Exhibit "D" of the Complaint herein contains a transcript of all the evidence introduced at said hearings bearing upon the matters involved in said Complaint, and further denies that said Paragraph VI contains the full truth or correct statement of the matters upon which evidence was offered to and rejected by the Commission in said hearing, and denies also that evidence upon the matters set forth in sub-paragraphs 1 to 13, inclusive, of said Paragraph VI of the Complaint would have been material or pertinent to the issues then pending before the Commission; alleges that some of the proffered testimony, particularly that described in sub-paragraphs 11, 12 and 13 of said Paragraph VI, was cumulative in that substantially the same testimony had already been heard and received of record by the Commission in said hearing.

Further answering said Paragraph VI, State of Colorado particularly denies that said Commission made its reports and entered its order in the proceeding described in said paragraph without a legal hearing, and alleges that the hearing held and conducted by the Commission fully complied in all respects with the requirements of the Interstate Commerce Act, and with the rights of all parties to the proceeding arising out of any other act or law.

III

State of Colorado disclaims any knowledge or information concerning the allegations contained in Paragraph VII [fol. 283] of the Complaint; and, therefore, neither admits nor denies said allegations, but alleges that the facts therein alleged, even if true, have no bearing on the validity of the said order of the Commission.

IV

State of Colorado denies the allegations made and contained in Paragraph VIII of the Complaint.

V

For answer to Paragraph IX of the Complaint, State of Colorado denies that the matters, things and conclusions therein alleged are relevant or material to the issues laid by the Complaint; and alleges that the matters and things so alleged are irrelevant, incompetent and immaterial to the issues in this case, are based on speculation, and are not susceptible of proof; but State of Colorado alleges that even if said allegations were true, they have no bearing upon the question of whether said order is valid and lawful, but are matters for consideration by said Commission in its capacity as an administrative body and may not be considered by this Court sitting in judicial review of said order, and State of Colorado, therefore, neither admits nor denies said allegations of said Paragraph IX.

VI

State of Colorado denies each and every allegation made and contained in Paragraph X of the Complaint; and particularly denies that any irreparable or other legal damage or injury will result to the plaintiffs, or to anyone else, from said order made and entered by the Commission in said proceeding.

VII

Except as herein expressly admitted, State of Colorado, denies the truth of each and every allegation made and contained in the Complaint.

[fol. 284] Wherefore, having fully answered the Complaint, State of Colorado prays that the relief therein sought be denied and that the Complaint be dismissed at the cost of the plaintiffs, and that it have such other and further orders, decrees and relief as may be just and proper.

Clarence L. Ireland, Attorney General of Colorado; Colin A. Smith, Assistant Attorney General of Colorado; (Sgd.) Howard Duane, of Counsel, Solicitors for Intervener- State of Colorado and Public Utilities Commission of the State of Colorado.

Duly sworn to by Dan S. Jones. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 285] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR PRELIMINARY INJUNCTION—Filed Nov. 10, 1931

And now, to-wit, this Ninth day of November, A. D. 1931, comes The Moffat Tunnel League and Uintah Basin Railroad League, Plaintiffs in the above entitled cause, by John J. Morris, Jr., Esq., one of its Solicitors, and moves the Court for the issuance of a preliminary injunction against the Denver and Rio Grande Western Railroad Company, one of the Defendants in the above stated cause, pursuant to the prayer of the Bill of Complaint.

(Sgd.) John J. Morris, Jr., Solicitor for Plaintiffs.

[File endorsement omitted.]

[fol. 286] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION APPROVING "AGREED NARRATIVE STATEMENT"—Filed Oct. 25, 1932

It is stipulated and agreed between the parties that the attached "Agreed Narrative Statement of Evidence before the Interstate Commerce Commission" shall be substituted for "Plaintiff's Narrative Statement," etc. heretofore filed herein and shall be incorporated in the record on plaintiff's appeal to the Supreme Court of the United States as the "condensed agreed narrative statement," etc. referred to in the "Stipulation for Record on Appeal," filed or to be filed herein.

Dated October 19, 1932.

J. J. Morris, Jr., Albert L. Vogl, Solicitors for [fol. 287] Plaintiff. Elmer B. Collins, Solicitor for United States of America. Nelson Thomas, Solicitor for Interstate Commerce Commission. C. A. Southerland, Henry McAllister, Solictors for the Denver and Rio Grande Western Railroad Company. Dudley C. Lunt, Elmer L. Brock, Solicitors for the Denver and Salt Lake Railway Company.

Norton Montgomery, Erskine R. Myer, Solicitors for Moffat Tunnel Improvement District and Moffat Tunnel Commission. Colin A. Smith, Howard Duane, Solicitors for the State of Colorado ex Rel. Public Utilities Commission of the State of Colorado.

[fol. 288] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

No. 909. In Equity

THE MOFFAT TUNNEL LEAGUE, a Voluntary Association; Uintah Basin Railroad League, a Voluntary Association, Plaintiffs,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and the Denver and Rio Grande Western Railroad Company, Defendants, and the Denver and Salt Lake Railway Company, The Moffat Tunnel Improvement District and Herbert C. Fairall, et al., as Members of the Moffat Tunnel Commission; the State of Colorado ex Rel. The Public Utilities Commission of the State of Colorado and Worth Allen et al., as Members of said Commission, Interveners

Agreed Narrative Statement of Evidence Before the Interstate Commerce Commission—Filed Oct. 25, 1932

ABBREVIATIONS

The following abbreviations will be used in this Narrative Statement:

The Interstate Commerce Commission will be referred to as the "Commission."

The Denver and Rio Grande Western Railroad Company will be referred to as the "Applicant."

The Denver and Salt Lake Railway Company will be referred to as the "Moffat Road."

The Moffat Tunnel Improvement District and The Moffat Tunnel Commission will be referred to as the "Tunnel District."

The Moffat Tunnel League and Uintah Basin Railroad League will be referred to as "Protestants."
The Dotsero Cut-Off will be referred to as the "Cut-Off."

[fol. 289] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 8070

Application of THE DENVER AND RIO GRANDE WESTERN Railroad Company for Control of The Denver and Salt Lake Railway Company

Hearing Before Examiner Haskell C. Davis at Denver, Colorado, March 24, 1930

(Numbers in parenthesis refer to the pages of the typewritten transcript)

Petitions of intervention on behalf of the Protestants were presented by Albert L. Vogl, attorney, whereupon Examiner Haskell C. Davis (hereinafter referred to as the "Examiner") said:

"There are a lot of things in here that are not before us at all. If I would accept them I would not receive evidence on them. I have got nothing here about extending the Denver & Salt Lake westerly, Mr. Vogl, not hearing any case of that kind at all, or anything concerning Uintah Basin needs for railroad facilities.

"Mr. Vogl: Those matters, we believe, go to the question of public interest, which is the matter which this Commission has before it, as to whether the public interest will be conserved.

"Exam. Davis: Yes, we understand the public interest. We have a specific case here, and I will limit the evidence to what covers this specific case. I am not hearing the Uintah case, the Dotsero Cut-Off, or any of those cases" (6-7).

After the appearances had been entered the Examiner made a statement as follows:

"Now I am hearing the application of the D. & R. G. to acquire stock control of the Denver & Salt Lake; I am not hearing the Dotsero Cut-Off case or Uintah Basin case,

or anything of that kind, I am confining the issues to what is before us" (10).

"Now, in taking testimony, testimony in its general [fol. 290] nature which is merely cumulative will not be taken. Now, that rule will be strictly enforced, and you will govern yourselves accordingly" (p. 10).

Thereupon Mr. McAllister opened applicant's case by offering in evidence exhibits 2, 3, 4, 5, and 6, attached to the application (10-11).

Mr. McAllister: "May it please the Examiner * * *. It would seem to me that there were certain proceedings in Finance Docket No. 4555, Proposed Construction by the Denver & Salt Lake Western Railroad Company that were pertinent to this case, as indicating the general situation and one reason why the purchase involved in this case was to be made, and for that reason I offer these exhibits" (12).

Thereupon a copy of the report and order of the Commission in Finance Docket 4555 was introduced as Exhibit 1, being a copy of the report in Proposed Construction by Denver & Salt Lake Western Railroad Company, 154 I. C. C. 51 (14).

Exhibit 2 was next introduced, being a trackage agreement proposed by the applicant and filed by it with the Commission, being a plan for the joint operation by the applicant and the Moffat Road over the Cut-Off and over the Moffat Road between Denver and the Cut-Off, after the Cut-Off had been constructed (15-16).

Exhibit 3, a copy of the Moffat Tunnel Act, was then introduced (Chapter 2 of the Laws of Colorado Extraordinary Session 1922).

William H. Willaims, a witness called by applicant, testified:

I am a director, member of the managing committee, member of the executive committee, and chairman of the executive committee, of applicant, and have been connected with applicant since the reorganization December 30, 1924. The chairman of the Western Pacific and myself alternate from year to year as chairman of the board and the execu-

tive committee of the applicant. I have been continuously associated with railroads since 1890. I am chairman of the [fol. 291] board and chairman of the executive committee of the Missouri Pacific Railroad Company, which company owns a fifty (50) per cent interest in applicant's common stock; the other half of the common stock is owned by the Western Pacific corporation, a holding company for the Western Pacific Railroad Company, and the voting rights in applicant's corporation are limited to the common stock (18-20). The plan of reorganization of the applicant, as entered into in Janaury, 1923, and modified in February, 1924, provided that the applicant was to encourage the creation of a short line from Denver to Salt Lake City by the utilization of applicant's existing line from Salt Lake City to Dotsero and a line from the latter point through the proposed Moffat Tunnel to Denver. Such a short line can be secured through the construction of the Cut-Off and operation over the Moffat Road from Dotsero to Denver, which would shorten the present distance from the west to Denver via the line of the applicant 173 miles. The applicant did not commence negotiations for the use of the Moffat Road immediately after applicant's reorganization, because it desired to have more definite information as to applicant's own operating results. Further, applicant was hopeful of ultimately acquiring a controlling interest in the Moffat Road. Applicant also desired to wait until the completion of the Moffat Tunnel was assured, and the terms under which the Tunnel could be used were known, so that it could be determined whether the financial results of operation over the Cut-Off and the Moffat Road and through the Tunnel, would be justified. There are several ways by which the short route could be made available for handling applicant's traffic, i. e., purchase of the Moffat Road or a controlling interest in it; leasing the Moffat Road; leasing the Cut-Off and operating applicant's trains over the Moffat Road from Orestod to Denver under a track-[fol. 292] age agreement; or interchanging business with the Moffat Road on the basis of joint through rates. Either of the first three methods give the equivalent of a one-line operation which is essential to assure applicant full protection for its traffic. The fourth method is objectionable to applicant, because it does not afford sufficient protection of applicant's traffic to warrant applicant building up its traffic by that route, and "the divisions suggested by the

Denver & Salt Lake would so reduce the net income of the Denver & Rio Grande Western as to seriously impair the credit of the latter" (20-23.) The Moffat Road declined to lease its line to the applicant, but expressed a willingness to build the Cut-Off and to lease it to the applicant, and to grant applicant trackage rights between Dotsero and Denver. Negotiations for such a trackage contract have been under way since March, 1928, but litigation concerning the validity of the Moffat Tunnel contract interrupted the negotiations. In the meantime, applicant acquired 4,877 shares of stock and 16,457 voting trust certificates of the Moffat Road, the latter being exchangeable for an equal number of shares of common stock, at the termination of the voting trust in 1937. Applicant has entered into a contract with Burr & Company whereby they agree to sell and applicant agrees to buy 7,635 additional shares of Moffat Road stock subject to approval of the Commission. In this way applicant will secure 28,969 shares out of a total of 50,000 shares or 57.938% of the issued and outstanding stock. The acquisition of this stock does not necessarily secure immediate control inasmuch as approximately 80% of Moffat Road stock is deposited under its voting trust agreement. There are five voting trustees of which applicant is assured of two. A third trustee has indicated a willingness to resign otherwise applicant would only come into actual control with the termination of the voting trust in 1937. $155.00 per share [fol. 293] was the best price at which the stock could be acquired and is a reasonable and fair price in the judgment of the managing committee and board of directors of the applicant (23-25). Applicant believes that shortening its route from the west to Denver, 137 miles, will enable it to secure a very substantial increase of traffic which otherwise it could not obtain. Today applicant is handling only about 10.5% of the eastbound perishable traffic from the northern section of California. Substantial physical improvements in applicant's road have enabled it to reduce its running time four and one-half hours between Salt Lake and Pueblo, and to increase the speed of trains. The total improvement in time between Salt Lake and Pueblo is about fifteen hours. The operation over the Cut-Off, reducing the distance 173 miles, will result in a substantial improvement in the service via the Denver gateway and those improvements would enable applicant to secure a substantial increase in through traffic via the Denver and Pueblo gate-

ways. "The purchase of Moffat Road stock was made by applicant to facilitate and protect the Cut-Off route" (25-26).

Applicant believes that under the present tunnel contract, the Moffat Road has the right to grant trackage rights to applicant, including the joint use of the Moffat Tunnel, without the payment of any additional rentals for the use of the Tunnel. This view of the contract is disputed by the Tunnel Commission. The question of the validity and construction of the Tunnel Contract is now being litigated in the Federal Court. If a satisfactory contract for the use of the Tunnel cannot be made, then a new Tunnel must and will be constructed. Applicant would much prefer to use the existing Tunnel, but such a tunnel four miles in length can be built for approximately six and one-half million dollars. If that action is taken it will be solely for economical reasons. "The question would thus be as to the cheapest way of securing the benefits of the [fol. 294] short route via the Cut-Off." The time of the construction of the Cut-Off is dependent upon the decision in the Tunnel Contract suit. As stated, if favorable, we are hopeful a contract can be entered into with the Moffat Road, for the use of its line, and that construction of the Cut-Off will proceed expeditiously. If unfavorable, there will be delay until a new tunnel lease is negotiated, or if this is not possible, it will be delayed until a new tunnel can be built. (28). The creation of the short route would be very much to the interest of the applicant, as it would secure a reduction of 173 miles in distance between Salt Lake and Denver; would enable applicant to retain to its own line its present traffic, as against fast-scheduled freight trains of competitors. In 1927 applicant's freight between Dotsero and Denver amounted to 23,117 cars, or 487,349 tons, on which applicant's revenue was $3,459,055.00. The creation of the short line would enable applicant to secure a substantial increase in traffic, estimated at 19,800 cars, or 363,275 tons, for the fifth year of short line operation. Applicant's revenue on this would be $2,100,000.00, and the operation over the short line would eventually reduce applicant's cost of operation. Applicant estimates that the out-of-pocket cost of handling the present freight business between Denver and Dotsero in the year 1930 would be

$629,568.00 and if this traffic were handled over the Cut-Off, this cost would be reduced to $337,545.00, a saving of $292,023.00 for that year. At the beginning this saving would be more than off-set by the overhead charges for the use of the tunnel and the Moffat Road. But it indicates the possibilities of the new route, if sufficient traffic can be developed (28-29).

Voting trust agreement could be terminated prior to 1937 by the voluntary agreement of the trustees, but not otherwise (31).

[fol. 295] It is applicant's purpose to build the Cut-Off as quickly as it can (31).

The basis for the $155.00 per share value of Moffat Road stock was a book value of $138.00 per share, and consideration of the tremendous advantage and vital necessity to applicant of a short route to Denver (31-32), and it offers the cheapest way for applicant to get such a short route (32). By stipulation it was agreed here that the report of the Commission fixing the financial value of the Moffat Road's stock, as reported in Docket 770, 119 I. C. C. 483, might be considered as part of the record (33).

The net increase of additions and betterments to the Moffat Road from the date of the Commission's final valuation to October 31, 1929, was $3,572,601.00 (33). If the Commission grants authority to the applicant to purchase control of the Moffat Road, the applicant is willing that the order should contain a provision that the applicant must purchase, at $155.00 per share, all minority stock offered to it within six months from the date of the order. The Moffat Road stock is not listed on any New York stock exchange. There are about 4,000 shares which are "pretty well distributed", the balance being held in two large holdings (33-34). We have already financed substantially all of the stock purchased with cash on hand. If we go forward with the purchase of the other stock it will be necessary for applicant to borrow some money. We have not yet determined whether the purchase would ultimately be paid for out of earnings or whether applicant would have to sell some of the securities held in the treasury, and which were authorized against capital expenditures paid for out of earnings. We would not issue bonds for the purchase of the Moffat Road stock (34).

[fol. 296] Testimony of Mr. Williams on Cross-examination by Mr. Norton Montgomery

The shortening of the distance from Salt Lake to Denver 173 miles would be accomplished by operating through the present Moffat Tunnel; the Tunnel saves 23 miles as compared with the operation over the hill through which the Tunnel is bored; the possible new tunnel referred to by me would be in the vicinity of the present Moffat Tunnel, but at a higher elevation. Personally I have not been on the ground, but am satisfied, from reports to me, of the practicability of such a tunnel; a construction company offered to file a bond to construct the tunnel for five and one-half millions, and the extra costs were estimated at one million (35-36). It is my understanding that prior to the building of the present tunnel, it was proposed to build a four-mile tunnel, but that the plan was changed so as to put the tunnel lower down to make it available for bringing water to Denver (37). The new tunnel, if built, would connect with the present Moffat Road (41). The present application is based upon the assumption that the decision of the United States District Court in regard to the Moffat Tunnel lease, will be sustained by the Circuit Court of Appeals; if it is not sustained it will mean further delay in getting the Cut-Off completed, as it would then be necessary for the Moffat Road to negotiate a new contract for the use of the tunnel (42-43).

Testimony of Mr. Williams on Cross-examination by Mr. Rogers

I know that the Moffat Road made an investigation of a proposed route through this four-mile tunnel higher up the mountain, and Mr. Mudge also made an investigation of it. The grade would be a two per cent grade, the same as it is today, but the line would be some eight to ten miles longer than the present line through the present Moffat [fol. 297] Tunnel, but the tunnel would be a shorter tunnel, four miles instead of six miles; Mr. Freeman informs me that the elevation of the shorter tunnel is about three hundred feet higher than the elevation of the present tunnel, but we lengthen our line in order to protect our two per cent grade. One of the biggest construction companies in

the country offered to file a bond on the basis of five and a half million dollars for the construction. We are hopeful that you people out here will cooperate with us in getting this short route through, and we are very anxious to get it done, but there is a limit to what we will pay.

We have paid $155.00 a share for the stock of the Moffat Road and are willing to pay that for the rest of it, and that payment is absolutely independent of our being able to construct the Cut-Off and carry through traffic on the Moffat Road; it is our view that all of the stock of the Moffat Road is worth $155.00 a share to the applicant because we feel confident in one of two ways we can connect up and make it a usable and desirable road—either through the present Tunnel or another one, but I will say that without the thought in mind of building the Cut-Off we would not be interested in the stock, so we have coupled the two things together in our minds in determining what is a fair and reasonable price for us to pay.

"Q. I am asking you, independent of the construction of the Dotsero Cut-Off, and the use of the Tunnel, do you think that this purchase at $155 is a sound purchase for the Denver & Rio Grande Western?

"A. We feel it will give a fair return on the investment.

"Q. By that answer you mean then that you think it is a sound investment at that price?

"A. We think it is a fair investment for us to make" (46-47).

In arriving at the valuation of $155.00 a share we have treated the Moffat Road as an entirety, operating through the Moffat Tunnel, and have not segregated that value [fol. 298] as between the right to use the Tunnel and the rest of the railroad (48). At the present time the Moffat Road is operating about seven trains a day through the tunnel, but we consider the capacity of the tunnel to be about forty trains a day. If we operated through the tunnel and over the Cut-Off we would probably have about twice as many trains as the Moffat Road. The number of trains we would eventually operate would be dependent upon the development of the locomotive. If we put an electric operation on that line we might have longer trains, so that the

increase in trains would not be comparable to the increase in traffic; we would expect to move through the tunnel all classes of freight that will move through the Denver gateway (49-50).

The acquisition of control applied for here would ultimately put the Moffat Road entirely in the possession of the applicant. In the Commission's final plan of consolidation, the Moffat Road and applicant were both allocated to the Missouri Pacific, so that this control fits in with the final consolidation plan of the Commission. The witness was asked what would be the applicant's attitude toward the construction of a western extension from Craig, to connect with Utah or other western points "so as to take through traffic over the Denver & Salt Lake into Denver without reference to the D. & R. G. W." The witness answered, "It is purely a question of what the traffic will sustain". It would be unfair toward the stockholders and the public for us to construct mileage which would not sustain itself, because otherwise it becomes a tax on the traffic which you are already moving. Unless you have some reasonable hope of developing rapidly enough to sustain that line I think you would wait until there was more traffic in sight. Asked whether he meant that he would not consider the construction of a route west until there was business to legitimately sustain it, the witness said, "I cannot say at the moment, I haven't had to face that but I would [fol. 299] not expect a plan to be submitted unless there was some reasonable expectation that the expenditures would earn some reasonable return". The general tendency of freight rates now is downward, and the general tendency of wages upward; new competition such as the motor bus and airplane is facing us and we have to fight for our existence. "At the present time, in the territory here, we are not earning on the increased investment an amount equal to the carrying charge; if we finance all those improvements with bonds, we have to use some surplus earnings. It is quite evident, under those conditions, that we couldn't look forward to the building of much mileage that would not sustain itself." Asked what his attitude would be toward the establishment of through rates and free interchange of freight, if some other agency should build westerly from Craig, the witness stated that he would

face that situation when it arose; that it would be most undesirable at this time to have the Commission make an order in connection with the proposed acquisition of control which would insure through routes and appropriate rates with such a western extension. The witness explained "we might find ourselves in a position where we opened our line to a competitor and he did not open his line to us. The people of this state are interested in maintaining our credit if they want any service, and they are dependent almost entirely on us for that service". Here some discussion occurred between counsel for the applicant and Mr. Rogers, concerning the attitude of the applicant to a request to the Commission that any permission given to the applicant should be tied in with a reservation for the control of through rates and routes west of Craig in the future, if an extension were build west from Craig, and Mr. McAllister objected, stating:

[fol. 300] "There is no other party, and there is no prospect of having any other party construct this road, and we object to this, because the act will give that party sufficient protection * * *. We think such a reservation has no place in this record and ought not to be made, and the road, is non-existent" (51-56).

Testimony of Mr. Williams on Cross-examination by Mr. Vogl

Exhibit 6 attached to the application showed the interest on the funded debt of the Moffat Road for 1928 was $810,000.00, and for 1929 $137,500.00, because for 1929 the interest on the income bonds had not been taken into account. After some questions, Exhibit 4 was offered by the witness to show the complete income statement for 1929 (58-59).

The shippers on the Moffat Road and applicant's road compete but "the roads do not compete, as I understand it". In Eagle and Grand counties there is a little territory which lies between the two roads, but I consider that so inconsequential that it was not in my mind, but I assume that both roads are soliciting for business in that territory, but I could not imagine the traffic from that territory equaling 500 cars a year, but I have not investigated (60-61). West of where the Cut-Off would be the Moffat Road goes almost at right angles to the applicant's line, and then turns and

goes west, but the distance between the two roads is so great that I cannot conceive of that being competitive territory; but traffic out of that territory, if it goes by rail, will have to move either by the applicant's road or the Moffat Road (61-62). The shortening of the distance between Denver and Salt Lake by the building of the Cut-Off would be the same whether the Cut-Off was built by the applicant or by the Moffat Road, but without the ability to have a one-line operation there would not be the assurance of a permanency of service that would protect the traffic of the applicant. We might start to operate that way and the Moffat Road might wind up in the possession of some other [fol. 301] railroad and we be shut off; we cannot afford to start to work through an uncertain route, and we would not do it. Further, the discussion with the Moffat Road indicated an inability to get a division of the through rate we could afford to pay. The proposition the Moffat Road offered would so seriously deplete our revenue as to raise the question whether we could pay the interest on the outstanding bonds, and in any event, it would destroy our credit and make it impossible to make bond sales in the future and finance our improvements essential to the maintenance of our service and taking care of increased traffic. The public is interested in that service (62-63).

For the first two or three years our operations over the short route would be at a loss, as compared with our present route, because the saving in operating costs would be less than the amount we would have to pay for the right to operate over the through route. The saving in the operating costs would be about $290,000.00, but when we paid our overhead we would be in the red.

"Q. And you think that the dispute between you and the Denver & Salt Lake divisions would amount to sufficient to imperil the solvency of your road?

"A. Well, we know it.

"Q. Can you tell us approximately what would be the aggregate of the differences on that dispute you speak of?

"A. Well, I haven't those figures with me. I put them in the previous case.

"Exam. Davis: What is the object of all this cross-examination? You are spending an hour here, and I do not see what you are driving at.

"Mr. Vogl: I am driving at this, Mr. Examiner: We here are familiar with the constant talk of the poverty of this road now applying to this Commission for permission to spend a great many millions of dollars. I want to see where that is going to leave their solvency.

"Exam. Davis: I am not taking testimony on the solvency or insolvency of the road" (65).

[fol. 302] "The Witness: Mr. Examiner, I should like to protest against his statement about our poor credit because we haven't made any statement of that kind. We have stated that a condition might be created which would produce that effect. We are seeking to avoid it. We are proud of our credit" (p. 66).

"Mr. McAllister: Who are you representing in this hearing, Mr. Vogl, what interests?

"Mr. Vogl: I am representing the Moffat Tunnel League and the Uintah Railway League.

"Mr. McAllister: Are you opposed to building the Dotsero Cut-Off?

"Mr. Vogl: I am opposed to this railroad acquiring the control of the Denver & Salt Lake Road, Mr. McAllister" (66).

"Q. Now, the only new railroad line that you propose or that is contemplated if this application is allowed, as I understand it, is the building of the Dotsero Cut-off?

"A. We have made no statement to that effect.

"Q. Well, if there is any other that is contemplated, I would appreciate it if you would tell us, Mr. Williams.

"A. Well, we will build any time when the traffic will justify it—any time, anywhere."

The Cut-Off goes through a territory which will not immediately originate much traffic, and would not in and of itself justify the Cut-Off (67). The new traffic which would accrue to the applicant line would come from the general development of the territory served by applicant, and also the short route would enable applicant to get its fair share of the business in the territory that ought to feed Denver, and which in the past has been denied applicant.

The people located in that part of the Moffat Tunnel District west of Craig would be benefited by the building of the Cut-Off, because it would give them a shorter rail route to Salt Lake City than they have at the present time. They

could come back about 150 miles to the Cut-Off and then go over the Cut-Off to Salt Lake, whereas at present they must either truck to Salt Lake or come to Denver if the freight is to be moved by rail (70-71).

"Q. When you were discussing, in answer to your counsel's question, the matter of the financing of this purchase, [fol. 303] I assume you were also including in that the financing of the building of the Dotsero Cut-Off?

"A. No. The Dotsero Cut-Off is to be built by a subsidiary corporation of the Denver & Salt Lake.

"Exam. Davis: There is nothing about the financing of the building of the Dotsero Cut-Off before us in this proceeding. Don't go into that.

"Mr. Vogl: I desire the record to show I save an exception.

"Exam. Davis: Yes, the record can show he wants to go into the financing of the construction of the Dotsero Cut-Off" (71).

By Commissioner Bock:

"Q. Mr. Williams, is it fair to say the applicant is willing, therefore, to accept a certificate with the terms in it that the Dotsero Cut-Off will be constructed as soon as possible?

"A. I do not mean by that, possibly, just what you do. Of course, it would be possible to start as quick as you got your contract and got your forces on the ground. If that is what you have in mind, my answer would be no.

"Q. As I understand your testimony, that is one of the main purposes, and of course, the construction of the Dotsero Cut-Off is involved in the whole consideration, but there is one question that is delaying this matter, and that is the case pending in the United States District Court involving the legality of the lease on the Moffat Tunnel.

"A. That is right" (71-72).

Testimony of Mr. Williams on Examination by Commissioner Allen of the Colorado Public Utilities Commission

"Q. I assume you plan to go ahead and ask authority to build the Cut-Off in the proceedings which are now pending?"

We do not immediately come into control of this property. That action must be taken by the Moffat Road because until such time as we are in control of the management the Moffat Road will have the deciding voice. I plan to get that control as quickly as we can and I am hopeful of having the resignation of the third trustee, which would give us three out of five trustees and the controlling voice in the selection of the Board of Directors. The Moffat Road through a subsidiary, obtained the permit from the [fol. 304] United States Department of the Interior, which is essential to the building of the Cut-Off, and they have the surveys and charters, which presumably will be used as was originally intended. Even if the decision of the District Court on the tunnel contract should be affirmed, and we secured the resignation of the third trustee, we would not be in a position to proceed with the construction of the Cut-Off until the annual meeting when we could change the Board of Directors. This would be within a year, but I do not feel that we will have to wait that long as I am hopeful that we can reach an accord with the Moffat Road (73-74-75).

Testimony of Mr. Williams on Redirect Examination by Mr. McAllister

The lining of the present Moffat Tunnel is reported as in bad shape and in places concrete lining will have to be substituted for the timber lining, which it is estimated will cost between $1,800,000 and $2,000,000 (75).

Testimony of Mr. Williams on Further Questioning by Commissioner Allen

The witness was asked to submit for the record such reasonable conditions covering all of the various contingencies which could be reasonably inserted in the order granting the application, so that the people of Colorado would not be required to rely merely on a strong belief in the witness' sincerity. The witness stated the applicant's reorganization plan contained a statement of what the plan then was; the Western Pacific was most insistent that this route should be built, at that time it owned applicant and was fearful that if it lost a half voice in the management that

the long-cherished desire for the short route might not be fulfilled, "We have agreed to do that. They are going to insist on it. It is to their advantage and certainly we are not going back on our word." We are going to get through [fol. 305] some way but I do not know that it would be proper for the Commission to make reasonable conditions in its order because with all of these local questions we cannot say which way we are going through, but whatever happens we plan ultimately, as the result of the purchase of this road, to build the Cut-Off and operate through it. I do not know what kind of conditions could be put in the Commission's order, not knowing when the court decision will come down, and not knowing how long it will take to negotiate the new tunnel contract if that is necessary, and, personally, I do not see the necessity of such conditions being put in the Commission's order (76-78).

Testimony of Mr. Williams on Recross-examination by Mr. Rogers

The cost of building the Cut-Off would be around three to three and one-half millions. The Moffat Road estimates about two and one-half millions, and our estimate was about $3,800,000.00, but our estimate was made a year ago.

"Exam. Davis: Well, we won't go into that in this proceeding. All questions of construction costs and everything else are not in this case.

"Mr. Rogers: May we consider the material in the other cases in here, Mr. Examiner?

"Exam. Davis: No, we may not. If there is any record to be introduced there is no way of getting it in except by having it copied and presented.

"Mr. Rogers: I would like to pursue this matter a moment, if I may, then.

"Q. Do I understand then, that the filings on the right of way for the Dotsero Cut-Off are at the present time controlled by the Denver & Salt Lake Railway, owned and controlled by them through its subsidiary, so that you would be in possession of those on the acquisition of control of the Denver & Salt Lake?

"A. Whatever rights there are are controlled that way" (80-81).

Here Mr. Bamberger began to interrogate the witness. After some objection from the Examiner Mr. Bamberger stated his position as follows:

[fol. 306] "Mr. Bamberger: We wish to have it clearly understood here that we are trying to observe the situation here wherein, if any railroad desires to construct from Utah to Craig, that the line which the Rio Grande is endeavoring to purchase at this time will be available for such a railroad on an equitable basis. Now, my question goes toward that equitable basis.

"Exam. Davis: Well, we cannot go into a question like that now. I will let your statement of position stand as a request that if this application is granted, that it be upon condition that any future line built from Provo or Utah to Craig should have the right to operate over this road under trackage rights—that is, if they want to ask that; that if an order is entered upon that proceeding, it be upon such condition, should they ask it. I understood that takes care of your position, and I think the Salt Lake people generally in the same way" (81-82).

Testimony Pages 83-155 omitted. See footnote.

Testimony of Erskine R. Myer

The Tunnel District then introduced its testimony by witness Erskine R. Myer, one of its attorneys. He testified

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Footnote.—There was assigned for hearing with this case a petition of intervention of the bondholders of the Rio Grande Southern requesting in substance that any order made in this case should contain a provision requiring the applicant to make some provision for taking care of the bondholders of the Rio Grande Southern. The Rio Grande Southern does not connect with the Moffat Road and is in the extreme southwest of the State of Colorado and the testimony in reference thereto, being pages 83 to 155 both inclusive, is omitted from this narrative statement but was filed in the trial court because the Commission objected that the complete record of the testimony taken at the hearing of this case had not been attached to the bill in the lower court.

concerning the Act creating the Tunnel District; the building of the Moffat Tunnel; that the Tunnel is being operated by the Moffat Road; that bonds had been issued by the Tunnel District in the amount of $15,470,000.00 (156-158). The first issue of bonds was for $6,700,000.00, and the balance making up the $15,470,000.00 was represented by supplemental bond issues, the validity of which supplemental bonds is now the subject of litigation (159 and 162).

[fol. 307] Mr. Myer was then examined concerning the litigation in the Federal Courts involving the validity of the contract between the Tunnel District and the Moffat Road, which testimony is omitted as not material to the issues here involved. During the examination of Mr. Myer Exhibits 9, 10, 11 and 12 were identified and introduced the same being the opinion of the United States District Court for Colorado in the Moffat Tunnel lease suit, the final decree therein, the petition and order for appeal and the assignments of error 163-5).

Testimony of Mr. Myer on Cross-examination by Mr. Rogers

There are 80,000 taxpayers in the Tunnel District, about 70,000 of whom are in the City and County of Denver; the total assessed value of the real property in the Tunnel District extends through central and northwestern Colorado to the Colorado State line and——

"The law provides that the benefits of the Tunnel shall be assessable for the purpose of building the Tunnel and pursuant thereto the Tunnel Commission has assessed against the land in the Tunnel District benefits approximating 15% of the total appraised value or approximately $45,000,000.00.

"Q. What do you know in connection with the Moffat Tunnel history of the proposed extension westward from Craig to a connection with Utah points to be made at any time?

"Mr. McAllister: We object to that.

"Exam. Davis: Objection sustained.

"Mr. Rogers: Mr. Examiner, I want to ask the history of the public movement for an extension west.

"Exam. Davis: I do not care for any history. We have nothing before us about constructing anything westward. Let's keep to the issues in this case.

"Mr. Rogers: We are asking, Mr. Examiner, as one of the conditions to the granting of this permit, that the separate operation of the Denver & Salt Lake Railway should be preserved in such a manner that an extension westward from Craig should be encouraged. Under those circumstances, it seems to us we are making a condition which is entirely within the power of the Commission to establish, and testimony as to the possibilities on that is material here, it seems to us.

[fol. 308] "Exam. Davis: You can ask for that condition, there is no objection to that. But why go into all the history? I do not care to go into the history of it. I have no objecion to your asking conditions protecting the gateway there to the west.

"Mr. Rogers: The practicability, the public interest on that, the extent to which it has been discussed by various interests, it seems to us is a basis to make it material.

"Exam. Davis: The basis you may ask, but I do not care to go into the history.

"Mr. Vogl: Mr. Examiner, may the record here show that we save an exception?

"Exam. Davis: It is unnecessary, but you can show it.

"Mr. Rogers: I assumed exceptions were unnecessary.

"Exam. Davis: Yes, objection is sufficient" (168-169).

The Moffat Tunnel was leased to the Moffat Road January 6, 1926, and the first train was run through on February 14, 1928. Since then the Tunnel has been in continuous operation except for a slight interruption in 1929 for a few days owing to a slide in the Tunnel (170-171). The Tunnel District has made two levies of $516,000.00 each, collectible in 1928 and 1929, to be applied to the interest on the supplemental bonds, a part of the interest on the original bonds and about $40,000.00 for maintenance.

The rentals provided to be collected under the railroad contract will approximate close to 48% or 50% of the total bond interest and principal of the Tunnel District, assuming the $15,470,000.00 bonds to be all valid; the balance of the indebtedness, if the Tunnel District receives no other revenues, will have to be paid by the taxpayers within the District (171-172).

Testimony of Mr. Myer on Cross-examination by Mr. Vogl

The legal title to the Moffat Tunnel is in the Tunnel District; the Tunnel District comprises the real estate within the area prescribed and the District is a corporation under the law (176). The taxes or assessments collected by the Tunnel District are based upon the value of each piece of [fol. 309] real estate and improvements within the Tunnel District; the Tunnel District has followed the practice of accepting the valuation placed upon the property by the County Assessor in each county, and adopting the county assessment roll as the roll of the Tunnel District, and certifies the levy to each County Treasurer in the District upon that basis, and if the assessment roll changes the values from year to year the amount of the assessment against each piece of real estate would change accordingly. No part of the applicant's line west of Denver is in the Tunnel District (178-179).

Testimony of Mr. Myer on Cross-examination by Mr. McAllister

The Tunnel District constructed the railway tunnel and what is termed the water tunnel, and in fixing the rental to be paid by the railroad the Tunnel District used an estimated cost of the two tunnels of $9,220,000.00, apportioning to the railroad 66⅔%, and 33⅓% to the water tunnel. Upon that basis the rental in the railroad tunnel contract was arrived at (179-182).

About 89% of the assessments for benefits is against property in the City and County of Denver; about 1½% is against property in Moffat County (184).

Testimony of Mr. Myer on Further Cross-examination by Mr. Rogers

The witness was asked as to the type of benefits expected to be derived from the use of the Tunnel, which benefits were the basis of the assessments.

"Exam. Davis: Oh, I don't think we will go into that. I do not see how a witness could answer a question like that.

"Mr. Rogers: There was elaborate testimony taken, Mr. Examiner, in regard to the type of benefits that would ac-

crue from the use of the tunnel. I am trying to show, as we indicated yesterday, that there has been from the beginning a project to extend the Denver & Salt Lake westward from Craig included in the other plans, and that that is entitled to protection.

[fol. 310] "Exam. Davis: I do not care to go into any proposition about the extension of the Denver & Salt Lake from Craig to Utah. I haven't anything of that kind before me, so we will pass on to something else.

"Mr. Rogers: Mr. Examiner, we offer to show by the witness that the construction of the Denver & Salt Lake Railway has from the beginning included a plan under frequent public and railroad discussion for a western extension from Craig to Utah common points, or some other convenient connection with Utah points; that the construction of the tunnel was in aid of this project, as well as the local traffic of the Denver & Salt Lake from Denver to Craig, and the traffic possible through connection such as the Dotsero Cut-Off with the Rio Grande System.

"Exam. Davis: All right, make your offer. Any more?

"Mr. Rogers: Yes, sir. That a consolidation of the Denver & Salt Lake with the Denver & Rio Grande, a competitive road, will, unless protected, practically prevent any connection of that sort to the West. This is offered in connection with the requested condition sought in this case; that the transfer of control to the D. & R. G. W. should be subject to appropriate provisions to be made by the Commission for the protection of some such future western connection under proper interchange and joint traffic rates. And I desire in connection with that to prove that in the assessment of the very heavy benefits which have been assessed against a large area in Colorado, that there was from the beginning included as part of the benefits which those lands would receive the likelihood of a connection west from Craig, as well as carrying the local traffic between Denver and Craig and a possible connection with the D. & R. G. System through the Moffat Tunnel. That evidence was taken and the benefits actually assessed by the Tunnel Commission on the basis of evidence as to these three methods of operation.

"Mr. McAllister: We object as immaterial and irrelevant, and for the further reason that if and when any railroad is ever constructed from Craig westerly, its rights will be protected by the law.

"Exam. Davis: Pass on. Anything further?
"Mr. Rogers: Yes, sir.

"Q. We referred yesterday, Mr. Myer, to the general financial condition and transactions of the Moffat Tunnel District. Has the District at the present time any funds remaining from these bond issues, or have they all been spent?

"Mr. McAllister: We object to that as immaterial.
"Exam. Davis: Objection sustained.
"Mr. Rogers: I again offer to prove, Mr. Examiner, as part of the condition requested in connection with this order, that there is great public confusion in regard to the finances of the Moffat Tunnel District.
"Exam. Davis: Do you expect the Commission to smooth it out? What bearing has it on the proposition before us if there is?
[fol. 311] "Mr. Rogers: The Commission cannot grant this unless it is in the public interest. We have here a public interest, involving not only the general interests of the State of Colorado, but very specific interest of a population which is——
"Exam. Davis (interposing): I do not see how the amount of funds on hands with the Tunnel Commission has the slightest bearing on the question before us,—not the slightest.
"Mr. Rogers: Perhaps the Commission might take a different attitude, Mr. Examiner, and I would like to get it before you at least.
"Exam. Davis: You can ask the Commission to overrule my ruling, if you see fit. I do not care to take up the time going into all this stuff.
"Mr. Rogers: Very well, sir. We now offer to prove that the bonds of the Moffat Tunnel District are in default; that there is general public confusion and discussion in regard to them, and that the finances of the District are of such wide notoriety and have been so much subjected to public discussion and excitement that the whole position of the Denver & Rio Grande Western here, the applicant, and of the roads involved, is in danger so far as their public relations are concerned.
"Mr. McAllister: We object to that as immaterial and irrelevant.

"Exam. Davis: Objection sustained.

"Mr. Vogl: Mr. Examiner, in order to avoid having to repeat, may the record show on behalf of the Moffat Tunnel League and the Uintah Basin Railroad League that we want that same testimony upon this further point: that one of the matters to be considered in this matter is the future operation of the tunnel, and the finances of the Tunnel Commission at this time will have a bearing on whether or not we are to be further taxed for the support of the tunnel, and therefore it is material on that issue.

"Exam. Davis: It is material on that issue, but not material on the issues before us. This case simply involves the transfer of 7,000 shares of stock. All these questions are foreign to any issue before us here. I will let the record show that you request that, but it will be the same ruling.

"Mr. Rogers: Mr. Examiner, you indicate that there might be some theories on which this would be admissible in here.

"Exam. Davis: I do not know of any.

"Mr. Rogers: Well, you said it would be material on some issues.

"Mr. McAllister: Some other case.

"Exam. Davis: I did not mean it had any materiality in the case before us" (186-190).

[fol. 312] A map was then introduced in evidence as Exhibit 13 showing the boundaries of the Tunnel District, and the witness testified that all lands within the Tunnel District except State and Federal property and other governmentally owned property are liable for and have been assessed for the benefits of the Moffat Tunnel (191-192).

Testimony of Mr. Harry S. Dickinson, Commissioner of the Transportation Department of the Denver Chamber of Commerce

The witness testified that he has had 36 years in railroad or transportation work, 12 years in the traffic and operating departments, 14 months as a member of the Denver District Freight Traffic Committee to the United States Railroad Administration, and 24 years in commercial traffic

work; that he has had a limited acquaintance with railroad accounting and calculation of railroad earnings and operation; he is not a statistician. The witness introduced Exhibit No. 14, relating to the operating expenses, maintenance of way and structures, net railway operating income, and net income and operating ratio of the Moffat Road for the calendar years 1924, 1925, 1926, 1927, 1928, and for eleven months of 1929. The witness testified that this exhibit shows that the operating ratio of the Moffat Road has materially decreased in 1928 and 1929 compared with the previous years. The exhibit also shows the operating ratio of the Moffat Road after payment of Tunnel rentals. Sheet 3 of Exhibit 14 shows that the Moffat Road's operating ratio is less than that of other railroads operating in the same territory shown on the exhibit and very closely approximates that of the Union Pacific. The witness summed up the exhibit as showing very efficient operation of the Moffat Road, and that the operation through the Moffat Tunnel contributes materially to the low operating ratio figures shown (196-200). The witness then testified concerning some figures testified to in another case by a witness for the applicant concerning the eastbound and [fol. 313] westbound tonnage of the applicant for the years 1910 to 1921; that for the year 1922 applicant's interchange with the Burlington, Rock Island, and Union Pacific railroads was 1,037,736 tons eastbound, 237,255 tons westbound, all of which traffic would pass through the Moffat Tunnel if the Cut-Off was built, as would also traffic originating on applicant's line destined to Denver (202). The witness then testified that in his judgment the operations over the Cut-Off and through the Tunnel would tend to materially increase the tonnage which would move via applicant's line (203).

Testimony of Mr. L. M. Pexton

Mr. Pexton, Assistant General Manager of the Denver Union Stockyards Company, appearing for that company and the Denver Livestock Exchange, introduced two statements, Exhibits 16 and 17, showing the cattle and sheep received at Denver from point in Colorado and Utah which would move over the Cut-Off if the same is built, and a

statement of the cattle and sheep received at other markets from the same points of origin. These exhibits show 77,493 cattle and 224,970 sheep arriving at Denver during the year 1927 from various counties in Colorado and Utah, over the rails of the Applicant whose time to market would be materially shortened by use of the Cut-Off. The witness stated that if the Cut-Off was built the livestock now going to other markets and shown on Exhibit 17, would naturally move to Denver because of the saving of time over that route. Prior to the building of the Moffat Tunnel livestock shipments from Craig to Denver took from 30 to 36 hours; if unusual weather conditions occurred, frequently shipments had to be unloaded en route on account of the 36-hour law; since the Tunnel has been in operation the time from Craig to Denver has been shortened to from 12 to 15 hours and shippers reported that because of this shortening in time the "savings in shrink, appearance and other conditions affecting the sale of their livestock" total as much as [fol. 314] $5.00 per head on cattle and 50¢ a head on sheep (218-221). In 1929 two trains of cattle from points on the Moffat Road were handled through Denver without unloading and taken as far as McFarland, Kansas, 550 miles east of Denver, for the first feeding. Under old conditions they would have been compelled to feed at Denver (Craig is 232 miles from Denver). Rifle, Colorado, is a point on the applicant's line immediately south of Craig and is 387 miles from Denver. Over the Cut-Off the distance to Denver would be 214 miles, with materially less elevation than at Tennessee Pass and Palmer Lake (on the present route of applicant); the present time from Rifle to Denver on livestock shipments is 30 to 36 hours. Occasionally shipments require feeding en route. The shipments of livestock from all of the counties in Colorado and under ordinary conditions those from points in Utah shown on Exhibits 16 and 17, would come to Denver over the Cut-Off without feeding (218-221).

"Most certainly the building of the Cut-Off would benefit the D. & R. G. W. livestock producers to the same extent it has benefited D. & S. L. shippers. Over the Cut-Off the town of Rifle would be 18 miles nearer Denver than Craig,

whereas today it is 155 miles farther, with much higher passes to cross. The financial benefits to the D. & R. G. W. livestock shippers may be accurately estimated from these exhibits."

The witness figured, using $3.00 a head on cattle and 25¢ a head on sheep as the saving to the producers, that it would represent a possible saving to shippers on applicant's line on Colorado business alone of $249,862.00, for the year 1927. The witness desired to go on record as favoring the purchase of the Moffat Road by the applicant provided that the building of the Cut-Off would be thereby insured; the Cut-Off should be built regardless of whether the line is extended now or at some future time from Craig west.

"We are not opposed to the building of a line west from Craig if conditions and tonnage warrant. We do believe, however, that points on the D. & R. G. W. in western Colorado are entitled to better and quicker railroad transportation to Denver and to points beyond Denver. A very much [fol. 315] larger number of people will be served under the existing conditions by the building of the Cut-Off than by an extension west from Craig. The territory adjacent to the D. & R. G. W. is already developed; towns are already built and populated. They are entitled to better rail conditions if they can be economically created, and they can through the building of the Cut-Off. The two propositions are not related in any way and in our opinion should not hinge on nor militate against each other. The extension should depend on the tonnage which can be developed locally and not on through business which might be taken from some other line. It is very questionable how much through business might be secured by a line starting at Denver or Craig and ending at Salt Lake in competition with the present transcontinental line already built and rendering efficient service. * * * We feel the building of the Cut-Off should stand or fall on its merits, on what it will do in serving western Colorado and Utah Rio Grande shippers, and in making a better and more efficient railroad out of the Rio Grande. It is obvious the shortening of the D. & R. G. main line between Denver and Salt Lake 173 miles, with a material reduction in the rise and fall of that

line, will be advantageous to both the railroad and the shipper'' (221-224).

Cross-examination of Mr. Pexton by Mr. McAllister

The witness explained that the cattle and sheep shown on Exhibit 17 generally moved to Kansas City, St. Joe and Omaha Markets, some going over Applicant's railroad through Pueblo via the Missouri Pacific or Santa Fe, and some moving through Denver and thence east over the Burlington, Rock Island, or Union Pacific (224). Moffat Road livestock shippers have already benefited by the construction of the Tunnel, and Rio Grande shippers will be greatly benefited if the Cut-Off is built and they are thus enabled to use the Tunnel. The Denver stockyards are paying substantial taxes for the Tunnel and want the benefits from the use of the Tunnel. The benefit which the stockyards expect to receive from the building of the Cut-Off will be in the widening of the Denver market (229-230). In the territory lying between Rifle and Craig, the livestock divides up pretty well at Meeker, about the half-way point, business north going to the Moffat Road and business south going to the applicant, and there is little competition between the shipments going north and the shipments going south (230).
[fol. 316] Whatever competition there is would be limited to a very narrow zone (230). Witness does not feel any disadvantage would arise from a control of the Moffat Road by Applicant (231).

Examination of Mr. Pexton by Commissioner Allen

Prior to the opening of the Moffat Tunnel, livestock shipments north of Meeker were frequently driven south to the Rio Grande road, but since the improvement of the service on the Moffat Road by opening the Tunnel, shipments generally divide north and south at Meeker (232).

Testimony of Mr. W. W. Garwood

Mr W. W. Garwood, representing the Moffat Tunnel Taxpayers Association, an unincorporated association of taxpayers in the Tunnel District, testified that his associa-

tion desired certain conditions inserted into any certificate which might be granted to the applicant in this case (238-239). These conditions were that before Applicant is authorized to acquire a majority of stock of the Moffat it should obligate itself that the Cut-Off will be constructed and put in operation within 18 months from the date of the order, by Applicant, or the Moffat Road, that the Moffat Road should be continued as an independent carrier with separate operations, accounts and statistics, that the routes and channels of trade via existing gateways for movement over the Moffat Road should be kept open so far as within power of Applicant to do, that a traffic agreement or lease between Applicant and the Moffat Road for operation by Applicant over the Moffat Road be entered into within six months from the date of the order subject to approval of the Commission.

Testimony of Mr. Garwood on Cross-examination by Mr. McAllister

The Association is unwilling that an unconditional certificate should be issued to the applicant to control the Moffat Road, one reason being that it is pretty close to the hearts of the people of this community and of Mr. Moffat [fol. 317] and Mr. Evans and the men who built the Moffat Road, to connect the eastern part of Colorado with the western part of the State, and they objected to any interference with the control and management of the Moffat Road because they have faith that the original plans will eventually be carried out if the Moffat Road is not controlled by another railroad (243-244).

Testimony of Edward C. Johnson

Called on behalf of the Moffat Tunnel League, Mr. Johnson testified:

I reside and have resided in Craig, Colorado, for twenty years. Am Manager of a milling and elevator company and farm produce cooperative located at Craig, and was delegated by the Moffat Tunnel League to be a witness at this hearing (247). The Moffat Tunnel League is sort of

a commercial club of counties, a sort of an association of counties of Grand, Routt and Moffat, all in the tunnel district; commercial clubs, which include service clubs, nominate members of the League and the County Commissioners of the three counties each designate from such nominees the members of the Tunnel League (248). Nine members, three from each County, constitute the League, which has been in existence for about five years (248). The Moffat Tunnel League is substantially a unified commercial organization to look after the interests of the three counties, and is not restricted to transportation matters. Mass meetings have been held throughout the district and all bodies, in an effort to consolidate and unify their efforts, have turned the whole matter of this hearing over to the Tunnel League (249). County Commissioners of the three counties have also delegated the matter of attending this hearing to the League (250). The Moffat Tunnel League is very much opposed to the granting of the application from two viewpoints; As taxpayers and as shippers. As shippers the League is opposed to the granting of the applica-[fol. 318] tion because at present the shippers are on the main line of a railroad——

"and we feel that if this acquisition is permitted we will be on a branch line. That is one point of view. Another point of view is that we are at the present time getting very splendid railroad service."

The competition in the territory between applicant's road and the Moffat Road is very keen, and there has been a contest between the applicant and the Moffat Road to get livestock to Kansas City in a certain number of hours. The contest was won by the Moffat Road by a large margin. One train load of livestock was shipped from Craig and one from Rifle, the shipment over the Moffat Road could have reached Kansas City within the 36-hour limit, but they were stopped for feed at McFarland, Kansas, on the Rock Island, and went into Kansas City the next day. The competition between the two railroads results in better service for the shippers. The service of the Moffat Road since the Tunnel has been built is good and prompt, and the shippers do not want to take any chances on what might happen if the control of the Moffat Road "passed up". Witness could not testify as to kind of service Applicant now gives.

"We are getting very excellent service, and we have no assurance that we will in the future, if any change is made." The principal shipments from the competitive territory consist of horses, hogs, cattle, sheep, wool, gilsonite, oil, and coal, and they are all competitive in a way, with the possible exception of oil (252-253).

"Q. Referring to the last matter that you mentioned, coal; there is a large movement also of coal from points in Colorado on the Rio Grande Western, is that not true?

"A. I understand that that is so, that there are large coal fields.

"Mr. McAllister: I object to any theory that there is competition between railroads because there are two different coal fields on these lines. I object to this testimony.

"Exam. Davis: Yes, leave the Rio Grande Southern out of it.

"Mr. Vogl: I am not talking about the Rio Grande [fol. 319] Southern, Mr. Examiner.

"Exam. Davis: He may answer the question.

"A. Yes, according to the geological maps, there are.

"Q. What do you know as to the two coals, that is, from the Routt County fields on the Moffat Road, and from points on the Rio Grande Western, being competitive?

"A. I understand they are about the same quality.

"Mr. McAllister: We object to that as immaterial.

"Exam. Davis: I sustain the objection. I do not care to go into general questions like that. It has nothing to do with this hearing.

"Mr. Vogl: I desire the record to show that the purpose of the introduction of this testimony is to show that the traffics of these two roads are competitive traffics, and that in view of the Act of Congress enjoining on the Commission the preservation of competition, that this is one of the material questions as to the public interest involved here.

"Mr. McAllister: We object to any testimony based on the theory that because the same commodities are found on the different roads, the roads are competitive.

"Exam. Davis: Objection sustained" (253-254).

The people I represent are taxpayers in the Tunnel District. The other territory that is seeking to come in under

the benefits of the tunnel are not taxpayers in the district and they are competitive with us in every way. If the Moffat Road could go ahead and become prosperous, that prosperity would reflect to our territory in better equipment, extended lines, and thus improve our taxpaying ability and the tax burdens of the Moffat Tunnel would be spread (255). Moffat County has an area of three million acres and the Moffat Road extends into that county a distance of something like seven miles.

"Q. What is the distance in a substantially straight line from Craig to the western boundary of Moffat County?

"Mr. McAllister: We object as immaterial and irrelevant.

"Mr. Vogl: The purpose of it is, Mr. Examiner, that there is a public interest here because these people have bonded their lands for the construction of the tunnel; that the building up of this territory out here will increase the values of that land, and as the tax is based on the values [fol. 320] of the lands, it will result in a proportionate lessening of the burden on all the land in the district. Therefore, the public interest is being interfered with by anything which will prevent the building up of that land.

"Exam. Davis: I sustain the objection.

"Q. Going back a minute to the competitive feature, what do you know concerning the contemplated construction of catch basins and similar devices in connection with the Boulder Dam, in this territory within the district?

"Mr. McAllister: We object to that as immaterial and irrelevant.

"Exam. Davis: Objection sustained.

"Mr. Vogl: I desire the record to show that we propose——

"Exam. Davis (interposing): I have made my ruling. Proceed.

Mr. Vogl: I think we are entitled to show what we propose to show by this witness, Mr. Examiner.

"Exam. Davis: I have sustained an objection to the question. Now if you want to make any offer of evidence, you can offer it.

"Mr. Vogl: That is what I am trying to do. We desire to offer by this witness testimony which will show that

there is a large volume of construction material which necessarily will move into the territory adjacent to the Moffat Road and adjacent to the Rio Grande Western Road, for purposes of construction of catch basins and similar devices in connection with the proposed construction of the Boulder Dam; that if the Denver & Rio Grande is permitted to get control of the Denver & Salt Lake or Moffat Road, it will then be in a position to stifle the solicitation of that business by the Moffat Road and divert it in that manner to the Rio Grande Western, to the detriment of the Moffat Road.

"Exam. Davis: Objection sustained. Go ahead.

"Q. Are you familiar with the efforts which have been made by the public in the territory served by the Moffat Road to secure the construction of the Moffat Tunnel?

"A. Yes, sir.

"Q. Will you briefly recite what those efforts have been?

"Mr. McAllister: To secure construction of the tunnel?

"Mr. Vogl: Yes, sir.

"Mr. McAllister: We object to that as immaterial and irrelevant. The tunnel is constructed.

"Exam. Davis: I sustain the objection.

[fol. 321] "Mr. Vogl: I desire the record to show that the purpose of this testimony, and we intend to prove by this witness' testimony, that the matter of the construction of the Moffat Tunnel has been a matter of public importance to the State of Colorado since approximately 1912; that during that time there have been several projects put forward and votes taken, both in the legislature of Colorado and by referendum votes of the people of Colorado, and that in each and every instance the people along the territory included within the Moffat Tunnel Improvement District have voted for the construction of the tunnel, and that the people along the territory which would be benefited by the acquiring of the Moffat Road by the applicant have consistently voted against it, and we offer that as evidence of the public interest of the two sections.

"Exam. Davis: Objection sustained" (255-258).

The witness testified that after hearing the testimony of Mr. Williams relative to the possibility of the applicant constructing a new tunnel he had conferred with other

representatives of the Tunnel District and that testimony had confirmed their objection to the granting of the application. Witness has lived along the line of the Moffat Road before and since the tunnel was built and the value of a strong railroad in that territory has been demonstrated by the improved service since the tunnel was built. The improved service is immediately reflected to all the shippers and the territory in the Tunnel District needs and should foster any move that will strengthen the Moffat Road. If Applicant gets control of the Moffat Road it would perhaps close our coal mines; take away our livestock shipping and if they neglect us it might be very disastrous in every respect to our shipping facilities and to the efficiency of the Moffat Road (260).

"Q. What percentage of Moffat County is at present under cultivation?

"Mr. McAllister: We object to this as irrelevant and immaterial, and extending this far beyond any reason.

"Exam. Davis: I will sustain the objection. I am not hearing any case about the construction of a railroad through the Uintah Basin. I announced that when I started. I do not care to go into all these questions as to the public and the need of railroad facilities; they are not before me.

"Mr. Vogl: We desire the record to show that we offer [fol. 322] to prove by this witness that the public interest and the public convenience and necessity require the construction of an extension westward from Craig, and that that is one of the considerations which should influence this Commission in determining the application before it, and this testimony is offered for that purpose.

"Mr. McAllister: We object to this testimony as immaterial.

"Exam. Davis: Objection sustained.

"Mr. Vogl: May I ask the Examiner and opposing counsel whether the objection also goes to the past history of the promises that have been made?

"Exam. Davis: Yes, that is wholly immaterial. I do no care to go into questions of that kind.

"Mr. Vogl: Then we desire that the record still further show that we offer by this witness to prove that from the time the road first commenced construction and through-

out the period during which the public have been asked to assist in the construction of the road in one way and another, including the passage of the tunnel law under which the tunnel was constructed, it was consistently held out that the purpose was to construct the road westward, and that the public would not have agreed to taxing themselves if that hope had not been held out to them.

"Mr. McAllister: We object to that testimony for so many reasons.

"Exam. Davis: Objection sustained.

"Mr. Rogers: The Denver Chamber of Commerce joins in the offer of that testimony.

"Exam. Davis: The objection will be sustained. It has no bearing on this case at all.

"Mr. Vogl: I assume it is not necessary to save exceptions to all the adverse rulings?

"Exam. Davis: No exception is necessary" (260-262).

The competitive area between the Moffat Road and applicant extends at least one hundred miles west of Craig (262).

Testimony of Mr. Johnson on Cross-examination by Mr. McAllister

"Q. Mr. Johnson, your position in this case is against the building of the Dotsero Cut-Off, isn't it?

"A. My position in this case is against the acquisition of the——

"Q. (Interposing.) No, answer my question, whether or not the position of yourself and your associates in this pro- [fol. 323] ceeding is now founded upon the proposition that the building of the Dotsero Cut-Off should not occur?

"A. That is not our position at all.

"Q. It is not?

"A. No, sir.

"Q. You are in favor of the building of the Cut-Off?

"A. If constructed by the right people, yes.

"Q. You are?

"A. Yes, sir" (262-263).

Witness' attention was directed to paragraph 7 of the Petition of Intervention of the Moffat Tunnel League, which stated that it objected to the granting of the application—

"For the further reason that an extension of the Denver and Salt Lake Railway west from Craig to intersect with other Pacific coast lines, would be of great benefit to inhabitants living along the proposed extension, to-wit: about 35,000 people who would be directly benefited thereby, while, in case of control of the D. & S. L. by the D. & R. G. W. R. a cut-off would be constructed connecting the two railroads, which connection would not benefit any people who are not already amply provided with railroad service, and which connection between said two roads would be made through a barren rocky canon without any inhabitants, while the extension would traverse a highly developed country, in need of transportation, without any rail transportation within 90 to one hundred miles in any direction."

Witness was then asked to state whether or not he was opposed to the building of the Cut-Off and answered, "Under certain conditions, no" (263-264).

Thereupon, Mr. McAllister asked of Mr. Vogl a direct question.

"Q. Are your clients opposed to the building of the Dotsero Cut-Off?

"Mr. Vogl: No, sir, but if the building of the Dotsero Cut-Off would prevent the extension of the road westward, yes, sir."

"Mr. McAllister: And your position further is that the building of the Dotsero Cut-Off would very likely prevent it?

"Mr. Vogl: No, sir, if the Moffat Road builds it, they will also build westward where there is tonnage."

* * * * * * *

"Mr. McAllister: If the Denver & Salt Lake builds the Cut-Off they will also build the extension?

[fol. 324] "Mr. Vogel: Yes, sir.

"Mr. McAllister: Well, that is a very clear statement, even though it may be somewhat fallacious" (265).

Witness Johnson continued: I am not particularly fond of the Moffat Road as a railroad, but I am fond of the service they give. I am familiar with the fact that the Moffat Road has discussed the building of another tunnel

but I know that at present they are using the Moffat Tunnel. The difference between the Moffat Road and applicant as I understand it is that the Moffat Road is paying the Tunnel District for the use of the Tunnel and the applicant wants to use the Tunnel without paying anything for it. My understanding is that the only interest applicant has in the Moffat Road is to get the contract which the Moffat Road now has for the use of the Tunnel.

I understand that the Moffat Road suggested the construction of an alternative tunnel in case the rent for the Moffat Tunnel was raised, as the result of the reduction of the contract (267-268).

I heard Mr. Pexton's testimony concerning the competitive traffic and that testimony is "far from being correct." The competitive territory extends from the Moffat Road to the applicant, that whole zone is competitive and not so long ago when the Moffat Road was not giving good service livestock shipments went south to the applicant. The present condition is that livestock shipments are coming north to the Moffat Road. The line dividing the territory tributary to the two roads is not a stationary line by any means. I do not know, but I think the Moffat Road competes for livestock right up to the Rio Grande railroad. The territory between the two roads is grazing land, much of it forest reserves, and the cattle shippers when they are ready to ship have the privilege of driving to either road, grazing on the way and finally making shipment. Shippers could graze all the way from Rio Grande right-of-way to [fol. 325] the Moffat Road, but I can't state any specific case where that has occurred (269-270).

Testimony of Mr. Johnson on Redirect Examination

As taxpayers we contribute toward the Moffat Tunnel in two distinct ways. We contribute as shippers and we contribute directly as taxpayers; as shippers paying our freight we contribute to the tunnel. Whenever we make a shipment out of Craig we pay the freight out. Whenever we ship anything in we pay the freight in; so that we contribute very materially to the Tunnel in that manner (271-272).

Testimony of Mr. Johnson on Recross-examination by Mr. McAllister

We have no objection to the Cut-Off being built by the Moffat Road; if the Moffat Road builds the Cut-Off then the Cut-Off does not become a competitive line with the extension west of Craig. If it is built by the applicant the Cut-Off is immediately a competitive line with the proposed extension. I say that because if the Moffat Road owned the Cut-Off they couldn't compete with themselves. Therefore, the extension from Craig to Salt Lake would not be competitive with the Cut-Off because the Moffat Road could not compete with itself (273).

Mr. McAllister to Mr. Vogel:

"Does that state your position—we will settle it right now—that your people are not opposed to the building of the Dotsero-Cut-Off by the Denver & Salt Lake or the Denver & Salt Lake Western? I want to find out definitely whether that is your position.

"Mr. Vogel: That is our position, yes, Mr. McAllister" (274).

Testimony of Mr. Gerald Hughes, Called on Behalf of the Moffat Tunnel League

Mr. Gerald Hughes testified that he is chairman of the Board of Directors of the Moffat Road and a member of the voting trust of that road; that he was a witness in [fol. 326] I. C. C. Docket 4555, usually referred to as the Dotsero-Cut-Off hearing, being the application of the Denver & Salt Lake Western for permission to build the Cut-Off; that he testified in that hearing:

"There have come up in these several conferences at times although not recently, questions concerning the attitude of the Salt Lake Railroad in regard to the extensions to Craig or to the permission to others to join us, such as the Salt Lake & Denver, and we have repeatedly stated that we would be unwilling to make any agreement of any kind that limited a western extension or which might close the Craig gateway, either for our own extension and

building as circumstances might hereafter come up, or as others might do if they felt it was necessary and advisable, the thought being that that was a part, at any rate, of the original plan and should be kept open" (276-277).

That statement also represent witness' attitude at the present time in regard to the western extension.

Testimony of Mr. Hughes on Cross-examination by Mr. McAllister

"By Mr. McAllister:

"Q. Mr. Hughes, has the Denver & Salt Lake Railway Company made any plans for such extension?

"A. None.

"Q. I will ask you whether or not it is true that in the negotiations which were occurring about the time of the hearing in Docket 4555, the case just mentioned, Mr. Williams, representing the Denver & Rio Grande Western, not only stated that they would not insist upon any such condition being attached to their contract with you, but that he would take the same position if he were in your place?

"A. My recollection is he did. I brought the subject up and either he or Mr. Schumacher, one or both, acquiesced in that position.

"Q. Since the time of that hearing the Denver & Rio Grande Western has never insisted in any manner or asked in any manner that any such condition closing any so-called gateway to Craig should be made in connection with the trackage agreement?

"A. They have not.

"By Mr. Rogers:

"Q. Mr. Hughes, you have tried, haven't you, personally to arrange the financing of an extension westward from Craig to Utah points?

"A. No, Mr. Rogers.

"Q. Never tried it?

[fol. 327] "A. I never have.

"Q. Have interests connected with you tried?

"A. Some of our directors have at times taken an active interest in that, particularly Mr. Alexander Berger, who has now sold out.

"Q. And it has always been part of the plan of the Denver & Salt Lake enterprise to carry on an extension west to Utah points, if practicable, hasn't it?

"A. Well, I couldn't say that, Mr. Rogers.

"Q. What are the facts in regard to it?

"A. I think the railroad has always hoped for an extension if the business would justify it, and of late years I think a great many in the road have felt that it could only be justified through some arrangements with the connecting lines on the east and west to favor it with through business.

"Q. Until recently, Mr. Hughes, it is true that the D. & R. G. W. interests have been hostile to an extension west from Craig?

"Mr. McAllister: I object to that, unless it is some hostility evidenced to Mr. Hughes. Mr. Hughes does not represent and has not represented the Denver & Rio Grande Western.

"Mr. Rogers: I am asking for Mr. Hughes' knowledge.

"A. No, the only—speaking of recent years, Mr. Rogers, you might say since the reorganization of the present Salt Lake Road and the reorganization of the Rio Grande, in which my conferences have been largely those referred to by Mr. Vogl in the matter of an arrangement for the construction of the Dotsero Cut-Off, and in that matter I stated it fully when the subject came up. I am not sure but what I volunteered it by stating our position just as I have, and the representatives of the Rio Grande have always stated that they never asked it. I think they stated more, that if they did the Interstate Commerce Commission would not permit it.

"Q. What about their attitude prior to that, if you know, prior to the reorganization of the Denver & Rio Grande, which just occurred in 1924? (277-280).

"A. In regard to what, Mr. Rogers?

"Q. In regard to a possible extension west to Utah common points.

"Exam. Davis: What difference does it make what the attitude was prior to 1924. This is 1930. I do not care to go way back in history six or eight or ten years; that does not help us any.

"Mr. Rogers: Our view is, Mr. Examiner, that the Western Pacific has pledged the Denver & Rio Grande under the reorganization now to continue this, but the Missouri Pacific is owned half——

[fol. 328] "Exam. Davis (interposing): I do not care to go into that.

"Mr. Rogers: We offer to prove by Mr. Hughes——

"Mr. McAllister: I object to the offer.

"Mr. Rogers: We offer to prove that the Denver & Rio Grande Western, prior to the reorganization, or rather the enterprise which is now known as the Denver & Rio Grande Western, prior to the reorganization of 1924, has taken an attitude hostile to the construction of the facilities of the Denver & Salt Lake Western Railroad which would lead to an extension west.

"Mr. McAllister: We object.

"Exam. Davis: The objection will be sustained" (279-280).

* * * * * * *

"Mr. Rogers: Mr. Examiner, in order to make the record clear, I want to tender and offer the testimony of Mr. W. F. Freeman, to the effect that the construction of the Moffat Tunnel and the organization of the Moffat Tunnel District were based on a long series of public activities and public campaigns by organizations in Colorado and by large groups of people in Colorado, as a means to facilitating the successful operation of the Denver & Salt Lake, otherwise known as the Moffat Road, not only as a local road leading from Denver into the northwestern part of the state, but also as a through connection for the general benefit of the state and of the various districts of the state, which it was expected would be made with Utah common points or other points west of Craig. I assume that in view of the previous rulings of the Examiner he will exclude this, but I want to make the record clear on it.

"Mr. McAllister: I object to it.

"Exam. Davis: The objection will be sustained" (282-283).

Hearing continued at Salt Lake City on March 27, 1930, before Examiner Haskell C. Davis.

Proceedings opened by Examiner Davis with the following statement:

"The Interstate Commerce Commission has set for further hearing at this time and place the application of the Denver and Rio Grande Western Railroad Company for authority to acquire control of the Denver and Salt Lake Railway by the purchase of capital stock, Finance Docket No. 8070.

"We have had a couple of days hearing on this application in Denver. Of course, I am hearing the case that is before me now. I have no case that is involving the construction of any railroad through the Uintah Basin, the Dotsero Cut-Off, or anything of that kind.

[fol. 329] "Some of the Utah interests wanted an opportunity to suggest certain conditions that they thought should be attached to an order, in the event that the Commission should grant the application. They have a perfect right to ask for that, and that is the reason we are here, to receive any suggestions as to such conditions as they think should be attached to the order" (322).

TESTIMONY OF JULIAM M. BAMBERGER

"Q. Mr. Bamberger, have you a statement to make relative to the matter involving the location of your proposed railroad with reference to the present location of existing railroads?

Mr. McAllister: May it please the Examiner, we object to the testimony of Mr. Bamberger with respect to this proposed railroad. That matter was covered in Finance Docket No. 4713, in the matter of the application of the Salt Lake and Denver Railroad Company to construct a railroad from the vicinity of Provo to Craig, Colorado. I cannot possibly see the relevancy to this application of testimony with respect to a railroad which is non-existent, as to which an unfavorable report of the Examiner was made in that finance docket, the construction of which is entirely problematical, for the imposition of any conditions in this application with respect to a railroad not in existence, and which if ever constructed may be constructed at

a time when conditions are entirely different from what they are now, or the imposition of any conditions with respect to trackage rights, so called, over the Denver & Salt Lake Railroad or through the Moffat Tunnel as intimated in some of these petitions in intervention.

We object to that testimony because the right of any such railroad, if ever constructed, must be determined under the law and conditions then existing, and is immaterial and irrelevant to this hearing." (324).

The Examiner stated:

"Under the practice of the Commission, they have a right to ask, if an order is issued, that it be subject to certain conditions. I do not care to take general testimony involving the construction of a new line through the Uintah Basin; but they feel it is necessary to introduce some testimony as a basis for their requests to attach conditions to the order. I think they have a right to do that. I will let them introduce a reasonable amount of testimony for that purpose, that is, as a basis for asking that certain conditions be attached to the order, if issued" (325).

Mr. Bamberger then continued: The Salt Lake and Den- [fol. 330] ver Railroad Company is a Utah corporation and holds certificate of the Public Utilities Commission of Utah, authorizing the construction of a railroad from Provo, Utah, to the Utah-Colorado state line en route to Craig; this company has been interested in four applications filed with the Interstate Commerce Commission, the Dotsero-Cut-Off application, Finance Docket 4555; the Uintah Basin Line application, Finance Docket 4713, in which we were the applicants; the Rio Grande, Soldier Summit-Vernal Branch Application, Docket 4768, which application was withdrawn before hearing and the present application, Finance Docket 8070. At the time of the hearing of our application in 1925 for authority to construct a

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NOTE.—Pages 284 to 319 of the transcript were testimony introduced by the applicant in rebuttal of the testimony introduced in connection with the Rio Grande Southern Railroad and is omitted from this narrative statement as not material to the matters here in issue.

line of railroad through the Uintah Basin, we hoped that our application and the Dotsero application would be heard concurrently, because the two applications are closely interrelated and should be considered together. The Cut-Off application was heard in 1928. We took the same position. There has been a report by your examiner submitted in our application and a preliminary finding by the Commission issued in the Dotsero application, but both of said cases are still open (325-327). The Uintah Basin line (proposed line from Provo to Craig) was organized as a community enterprise, headed by the Governor of the State of Utah, and subscriptions of $1,000.00 each were made by prominent citizens, most of whom resided in Salt Lake and Provo, it being the intention that no person should have in excess of one (1) $1,000.00 share, the primary purpose of the company being to advance the interest of the citizens and industries of Utah and promote the long-sought-for rail transportation to the Uintah Basin. It is our hope that the Commission will realize the importance to the States of Utah and Colorado and to the West, of the construction of a railroad through the Uintah Basin (328). Our line, if built, would be a competitor of the Union Pacific System [fol. 331] between Utah and Colorado and would have been approximately one hundred fifty miles shorter than that company's line between Provo, Utah, and Denver, Colorado, but the Union Pacific System offered no protest to the construction of our line and they have not objected to the issuance of a certificate by the Commission for our construction.

"On the other hand, the Rio Grande not only displayed a serious and severe antagonism to our application but in many ways has endeavored to make it difficult for us to proceed with our plans.

"Shortly after the filing of our application for the Uintah Basin line the Rio Grande filed an application for a branch line into the Uintah Basin from Soldier Summit, Utah, on their line, and endeavored by this means to divide the support of the interested communities and to becloud the issues so as to prevent the whole-hearted endorsement, which we would have otherwise obtained. Realizing, however, when the applications were called for hearing that they were unable to support and justify this application, they

were forced to withdraw the same immediately prior to the hearing of our application.

"When our application was heard the Rio Grande was the only protestant and a very vigorous one indeed and it was their scathing interrogation of the various witnesses that caused the community enterprise feature of this application to be overlooked and submerged by the picture which they endeavored to produce of a probable disastrous (?) effect on an impoverished Rio Grande in the event of the construction of the Uintah Basin Line" (329-330).

We recognize the importance to the States of Utah and Colorado of the applicant as a taxpayer and realize the necessity for it to obtain additional revenue; the applicant has been in financial difficulties and is unable at the present time to show an adequate return, due largely to the necessity of continuing to operate unremunerative branches and narrow gauge lines. The Uintah Basin, however, should not be deprived of a railroad transportation and an opportunity to develop, because of the applicant's financial situation (330). The unrestricted and unconditional control of the Moffat Road by the applicant would be contrary to public interest because (a) the building of the Cut-Off would prevent any line ever being constructed through the Uintah Basin, because it would provide a through route from Den- [fol. 332] ver to Provo, approximately the same length as the line from Denver via the Moffat Road and our proposed line, and as our proposed line cannot be justified without the revenue to be derived from bridge haul traffic, which would not be available to us then, as the Rio Grande would insist upon that traffic being handled by its own line over the Cut-Off; (b) It would grant to the applicant a complete and perpetual monopoly to all of Western Colorado and Eastern Utah and unless conditions are attached to this certificate there is no hope that the Uintah Basin will ever be privileged to enjoy railroad transportation unless the applicant voluntarily agrees to it; (c) applicant has repeatedly expressed great concern lest the Moffat Road should fall into competitive hands and it is evident that the underlying purpose of this application is to assure applicant control of the Moffat Road so that the same will not be available to competitors; (d) the Moffat Tunnel is a public enterprise and should be kept available for the public use

and that result will be thwarted if the applicant controls the Moffat Road and uses that control to prevent competitors of applicant from using the Tunnel and—

"Thus render the entire public project into a selfish individually enjoyed monopoly for which the taxpayers of the Tunnel District will foot the bill" (331-332).

There are eight railroad routes entering Colorado from the East, operated by five railroad systems. First, the Union Pacific, being in System No. 15; second, the Burlington and allied lines, assigned to System 14, having no allied western connections out of Colorado; third, the Rock Island, assigned to System No. 19 with no allied western connection out of Colorado; fourth, the Applicant, assigned to System 18 operating into Utah and thence west to San Francisco via its allied Western Pacific; fifth, the Santa Fe, assigned to System 17 with no connection southerly from Colorado, [fol. 333] except its own southerly line into California (334). Two out of five of these systems have friendly connections to Utah and if the other three systems desire to construct a transcontinental system through the central portion of the United States in competition with the Union Pacific and Missouri Pacific, the Commission must at this time make the necessary provisions to assure the use of the Moffat Road as a part of such system.

"Until the Commission indicates that the proposed Uintah Basin line is a justifiable part of the general railroad system of the United States and that such a line might be permitted providing that tonnage sufficient to show a return on the investment be developed, all exhibits or evidence as to probable tonnage are of no avail. If the Rio Grande's present system must be protected at all costs irrespective of the needs of the Uintah Basin or its citizens and industries, and only such construction will be authorized as will be remunerative to and will protect the Rio Grande, it would be futile to attempt to set out any prospective tonnage no matter how voluminous that traffic might be" (335-336).

The witness requested that the evidence introduced in Finance Dockets 4713 and 4555 be incorporated into this record and the Examiner ruled that he could not incor-

porate those records into this record unless the parts desired were specifically presented and identified (337).

(Here witness introduced three maps marked Exhibits 19, 20 and 21.)

It is intended that our proposed line should begin at Provo, passing through Springville and thence in a generally easterly direction to the Utah-Colorado line, thence it continues to Craig, Colorado, and would pass approximately through the middle of the Uintah Basin; this Basin is approximately one hundred miles north and south and three hundred miles east and west, is bounded on the north by the Uintah Mountains and on the south by the Book Cliff Range, and extends easterly through the eastern part of Utah, a distance of about three hundred miles over into western Colorado (340). The Moffat Road enters the Uintah Basin from the east to Craig; and there is a narrow [fol. 334] gauge line entering into the Basin at Watson and making connection with the applicant at Mack. These two are the only railroads in the Uintah Basin and the only railroad in the Basin within the State of Utah is the narrow gauge line previously mentioned, which extends into the State of Utah approximately twenty miles, and was constructed and has been utilized almost entirely for the transportation of gilsonite (342).

Testimony of Mr. Bamberger on Cross-examination by Mr. McAllister

Approximately $75,000.00 was subscribed in subscriptions of $1,000.00 each, for the preliminary financing of the proposed road, and somewhat in excess of $50,000.00 out of this $75,000.00 has been paid in. Very little has been paid in since the hearing in 1925 on the application for the permit to build the road, and it may be that I testified then that the amount that was paid in was $35,000.00 (343-344). The hearing lasted two or three days and briefs were filed. In January, 1926, the Commission's Examiner filed a report adverse to the granting of the certificate to build the proposed road, to which report we filed exceptions about July, 1926, and have never asked for a hearing on these exceptions (345). We have attempted negotiations with the Moffat Road during the past few years

to reach an arrangement for a joint through line between the proposed road and the Moffat Road but on account of the receivership of the Moffat Road it was impossible to do anything with that in view. Since the hearing in Finance Docket 4713 I have had negotiations with Mr. Berger of the Moffat Road with respect to the establishment of a through route, but I have no written agreement concerning the through route but have had several oral agreements with Mr. Berger. He has now sold out his stock in the Moffat Road (346-347-348). In our Finance Docket 4713, we requested, as a condition to the granting of our application, that the Commission should definitely put itself on [fol. 335] record against the building of the Cut-Off, although this was slightly modified toward the termination of the hearing (349). In the hearing in Finance Docket 4713 I was opposed to the building of the Cut-Off because the local business in the Uintah Basin would not support the construction of the proposed railroad without the larger through business which we anticipated. The proposed railroad is 297 miles and in the hearing in Docket 4713 I testified that the building of forty-one mile cut-off would tend to divert away from us a great amount of the bridge or through traffic which we anticipated would come to the proposed line, and I also testified that if the Cut-Off was built my recommendation would be that the proposed line should not be constructed and that the building of the Cut-Off would prevent us financing the proposed railroad. Toward the close of the hearing in Docket 4713 Mr. Berger testified that after conference with one or two of our associates in Salt Lake, that our position should be stated to the Commission thus:

"If, on review, you grant the permit to construct, leaving for subsequent determination the granting of a permit for the construction of the Dotsero-Cut-Off, we will accept this decision and endeavor to finance, realizing that it will add to our difficulties"

(350 to 352); and Mr. Berger further testified that in that hearing he would not say whether he would oppose the application for the building of the Cut-Off, and further stated, I don't know whether the building of the Cut-Off "would be a serious hindrance"; I think we could finance it very much better if there were no possibility of another road

(352-353). We want a condition attached to the granting of the present application that trackage rights be granted to our company (the Bamberger railroad) over the entire Moffat Road from Craig to Denver. We are not certain that we can finance our railroad. We have allowed our application to rest for four years. The Moffat Road came [fol. 336] out of receivership about 1926. We are not in a position to make a trackage agreement now. That would be absolutely impossible (354-356).

Testimony of Mr. Bamberger on Cross-examination by Mr. Vogl

I am familiar with the plans frequently published by the Moffat Road of its proposed extension west of Craig into Salt Lake, and in a general way, subject to some exceptions, these published plans followed substantially the line of the road proposed by me from Provo to Craig (359).

Testimony of Mr. J. S. Earley

Mr. J. S. Earley, Executive Secretary of the Utah Shippers Traffic Association, presented a resolution adopted by that Association and on cross-examination by Mr. McAllister stated that the resolution expresses the opinion of the Utah Shippers Traffic Association that some railroad, if and when constructed, to a connection with the Moffat Road at Craig, should have unlimited trackage rights over the Moffat Road similar to the trackage rights requested by the applicant. I don't know of any other railroad company proposing to build the extension other than Mr. Bamberger's road, and I don't even know they are going to build, but the railroad situation seems to be changing so rapidly these days that anyone might build the extension, even the applicant (360-363).

(In the course of his testimony, Mr. Earley introduced Exhibit No. 22, being a resolution of Utah Shippers Traffic Association.)

Testimony of Mr. W. H. Paul

Mr. W. H. Paul, called as a witness by Mr. Vogl, testified:

I have had about thirty years railroad experience—prior to May, 1918. I was with the Moffat Road as General Freight and Passenger Agent for about six years prior to May, 1918, and prior to that I was with the Rio Grande Western, as Chief Clerk in the General Freight Depart- [fol. 337] ment, as General Agent at Goldfield, Nevada, and as General Agent at Portland, Oregon. By the Rio Grande Western I mean the line from Grand Junction to Salt Lake, which is now part of the applicant's system. I am Secretary of the Uintah Basin League, which was organized within the last sixty days; this League is not incorporated, it is a cooperative organization of the service clubs, the towns, the irrigation companies, and the Boards of County Commissioners of Uintah and Duchesne Counties, representing practically all of the people of those counties. After the League was organized its first proposition was to endeavor to secure a railroad through the Uintah Basin in Utah, and then when we heard that the applicant was seeking to obtain control of the Moffat Road we took up the consideration of that proposition. The matter was taken up at a meeting of the Executive Committee, and after a long discussion a resolution was adopted that we are opposed to the granting of the application for the acquisition of control of the Moffat Road. Our opposition is because we believe that the expressed attitude of the applicant is prejudicial to the interests of the people in the Uintah Basin in Utah. In the discussion in the League, the attitude of the applicant in Docket 4713 was discussed, including the brief filed by the applicant in 4713, in which it was stated:

"* * * We say this, because it is evident that the people living in the Uintah Basin, whether in or around the so-called Vernal Country, or in the western Moffat County, Colorado, if the limits of the Basin be extended to include that area, would be benefited by the construction of applicant's railroad. That they need further transportation facilities is undoubted. That the business which they, or their sections, would contribute to this proposed railroad

would justify the enormous expenditure involved, is another and far different question, which we are satisfied must be answered in the negative" (363-367).

The railroad lines of the Moffat Road and the applicant are the same today as they were when I was with the Moffat Road. The competition between the two roads extends as [fol. 338] far west as Myton. A great many cattle are collected in the Uintah Basin and they have to be driven back to the Rio Grande for shipment east over that line and one of the largest shippers of livestock is very anxious to have a railroad into the Basin. I know that wool and livestock move from Vernal to Craig frequently in competition with the Rio Grande, but there is considerable tonnage of gilsonite moving from the Utah mines near the eastern limit of the Uintah Basin to Craig via truck; and then there is a limited amount of merchandise moving that way to and from Vernal. The competitive territory goes as far east as Orestod (368-9).

"Q. State what the facts are relative to the efforts of both the Moffat Road, or the applicant's road or its predecessor, when you were with those roads, of soliciting traffic in the Uintah Basin, both including the Utah portion and the Colorado Portion?

"Mr. McAllister: We object to that as ancient history, something that occurred prior to 1918.

"By Exam. Davis:

"Q. When did you say you left there?
"A. May, 1918.

"Exam. Davis: The objection is sustained.
"Mr. Vogl: We desire to show by the testimony of this witness the fact that he knows of his own personal knowledge, that while he was with the railroads that they were both actively soliciting for the traffic, both in Colorado and in Eastern Utah, or in what has been described as the Uintah Basin.
"Exam. Davis: The testimony is too remote. We are not affected here by what happened then. I will sustain the objection.

"By Mr. Vogl:

"Q. How long have you been living in the Uintah Basin?

"A. Since May, 1918.

"Q. Will you state what are the resources of that Basin which could be developed to afford railroad tonnage, if a railroad was built through there?

"Mr. McAllister: We object to that as immaterial and irrelevant.

"Exam. Davis: The objection is sustained.

"Mr. Vogl: Mr. Examiner, in order to shorten the record, I would like to now make an offer to prove by this witness, and by numerous other witnesses—by J. P. May, S. P. Baron, Fred Ferron, D. J. Thompson, A. G. Nord, R. W. Sheley, J. R. Radcliffe, Mr. Skinner, Mr. Peterson, [fol. 339] H. M. Tidwell and George M. Cahoon.

"Mr. McAllister: They are all here?

"Mr. Vogl: I believe they are all here, Mr. McAllister, in the room. I understood they were to be here. I have interviewed most of them.

"I offer to develop by these witnesses the available resources of the Uintah Basin, for the purpose of showing the public interest in having a construction of the present Denver and Salt Lake Road, either by the Denver and Salt Lake road or by some other company, west from Craig to either Provo or to Salt Lake City.

"Mr. McAllister: We object to all that as immaterial and irrelevant under the issues in this case, and especially because this case does not in anywise concern any proposed extension of the railroad from Craig westerly, nor is there any evidence that such a construction is imminent or feasible.

"Exam. Davis: The objection is sustained.

"By Mr. Vogl:

"Q. Now, Mr. Paul, will you state what examination you have made concerning the people moving out of the Uintah Basin on account of the present lack of railroad facilities?

"Mr. McAllister: We object to that, for the same reason.

"Exam. Davis: That is the same question. Objection sustained.

"Mr. Vogl: Then we desire the record to show that we offer to prove and establish by this witness that many hundred settlers who were induced to go into the Basin by reason of the prospects held out to them by the Denver and Salt Lake Road, by Government agents and by commercial bodies, of the imminent probability of the extension of the railroad through the Basin, that they came here and they have since left here and have stated their reasons for leaving because of the present lack of railroad facilities.

"Mr. McAllister: We object to that for the same reason.

"Exam. Davis: Oh yes. The objection is sustained. It is entirely outside of the issues of the case.

"By Mr. Vogl:

"Q. Will you state, Mr. Paul, what, if any, effort and inducements were made by the Denver and Salt Lake road to induce colonists to come out here and settle west of Craig, in both Colorado and Utah, while you were with the road, particularly in relation to what they held out concerning the future railroad developments?

"Mr. McAllister: We object to that for the same reason. Also because it refers to a situation which does not now exist.

"Mr. Rogers: We join in the same offer.

"Exam. Davis: The same ruling.

[fol. 340] "Mr. Vogl: We desire the record to show that if permitted we would develop by this witness the facts that the Denver and Salt Lake road conducted a long campaign of colonization, and as a part of that campaign, held out to the public and to possible settlers, that the purpose and intent of the Denver and Salt Lake road was to extend the line to either Provo or Salt Lake City, and that Mr. Paul himself, under the instruction of the vice president of the road, published half page advertisements, holding out that inducement.

"Mr. Rogers: We join in the offer.

"Mr. McAllister: We object to the offer for the reasons heretofore stated.

"Exam. Davis: The same ruling.

"Mr. Vogl: We will add to that also that we would develop by this witness that the United States Government, by posters in Post-Offices and other Governmental build-

ings, held out similar inducements to the public to colonize this section of the country by advising them of the probability of the extension of this railroad.

"Mr. McAllister: We make the same objection.

"Exam. Davis: The same ruling. The objection is sustained.

"Mr. Rogers: We may be considered as joining in this, without further statement?

"Exam. Davis: Yes.

"Mr. Vogl: I think that is all, Mr. Paul" (369-373).

Testimony of Mr. Paul on Cross-examination by Mr. McAllister

I was never connected with the applicant. I was connected with the Rio Grande Western between 1892 and 1898, and with the Denver & Rio Grande (the predecessor of applicant) between 1898 and 1910 (374). I am now engaged in farming and operating an apiary. I did not testify in Finance Docket 4713. Immediately following the passage in Mr. McAllister's brief which I read, occurs the following:

" 'That such construction would not only greatly impair the ability of the Denver and Rio Grande Western Railroad adequately to serve the public, but would add another weak, struggling and impecunious unit to the railroad map of the Rocky Mountain section of the country, is, we believe, manifest from a candid and conservative review of the record in this case.'

Is that stated?

"A. Yes sir.

"Q. Turn to page 60, please. I will ask you to state [fol. 341] whether or not this appears on page 60 of that brief:

" 'The Denver and Rio Grande Western Railroad Company realizes that its interests cannot be allowed to stand in the way of a necessary and economically sound railroad enterprise, which will not depend for its possible financial success upon the ruin of established systems of transportation. The prevention of their improvement and damage to communities and industries which have arisen along

their course, and which they serve. But the record in this case, both by direct statement of applicant's witnesses, and by necessary inference from the facts, shows that applicant proposes to live upon the traffic it takes from the Denver. Without it the Bamberger line would not exist even on paper, and the application would not have been presented. Even including this traffic, a fair review of the evidence and revision of the estimate respecting the cost of the projected railroad and its probable earnings must lead to the conclusion that it will not be self-sustaining, that it must fail financially, and that with such failure it will at least impair the ability of the Denver to fulfill its obligations to the public.'

Does that appear?

"A. Yes, it appears; but it does not appear to me to be true" (375-376).

The Uintah Basin Railroad League was organized shortly before this application was made, and after we heard of this application we arranged to take up this matter. The League was originally organized to secure railroad transportation for the Uintah Basin. It was just an association of people living in the Basin. The people of the Basin have been trying for about forty years to get a railroad through the Basin. We are not opposed to the building of the Cut-Off, if built by the Moffat Road and operated by them, because anything in reason that would increase the prosperity of the Moffat Road would probably aid it finacially and encourage it to extend the line westward from Craig through the Basin. It is our purpose to get the road extended west according to the original plan. I believe if the Cut-Off was built and resulted in the Moffat Road securing some tonnage it would make the road more prosperous than it is at present. I believe that the business in the Basin would support a railroad. I do not mean by that the business as it stands today, I mean the business that would come from the building of a railroad, from the [fol. 342] time the railroad is in there, the business that it would handle would justify it. I know of a lot more voluminous testimony than that which was introduced in the Salt Lake-Denver Docket. This testimony was obtained through the Erb management of the Moffat Road when

Doctor Pearson of the Pearson Syndicate undertook to finance the extension from Craig to Salt Lake, and the building of the Tunnel, which unfortunately was not carried out owing to the sinking of the Lusitania, on which Doctor Pearson lost his life. The sinking of the Lusitania forestalled that development at that time, which was in 1914 (377-380).

The competitive traffic consists of livestock and gilsonite from Vernal and eastern Utah. I know of livestock from shippers residing in the territory near Grand Junction which is ranged in western Colorado west of Craig and frequently is shipped out via Craig. Wool moves from the Vernal section both to Craig and to the applicant. Both roads have had agents soliciting traffic in that territory in recent years. The Moffat Road had solicitors in Vernal last year, and the year before last as far west as Myton, trying to induce the honey business to move that way. Honey is one of the principal crops in this section which can stand the cost of transportation to the railroad. The gilsonite, aside from that which moves to Craig, comes out of the Basin over the Uintah Railway (381-382).

The Uintah Railway is a feeder to the applicant. This competition extends east as far as Orestod. In Colorado there is competition in livestock and grain from the White River Valley; from the territory as far east as Orestod, the livestock and the grain competition exists. It is not a fact that the competitive territory divides practically at the midway point between Rifle and Craig; within the last week or so I have made inquiries about the competition from shippers in the territory. Practically all of the White [fol. 343] River Country is competitive, traffic can move to the applicant or the Moffat Road. Livestock from Ogden that feeds there is driven out to the applicant. The livestock drives probably one hundred miles as it ranges to the railroad, and the railroad that is used depends on where the range is, and the location of the feed, and where the livestock is fed. From Craig to Rifle is about sixty or seventy miles. I know the competitive conditions. There is no arbitrary line dividing the competitive territory. A man who lives two-thirds of the distance to the applicant may go to the Moffat Road if he is satisfied that the service is better or the distance shorter. I know from past

experience how hotly these shipments are contested for (383-385).

"Q. Now, state what, if any, investigations you made concerning the resources, or the probable resources, of the Uintah Basin Valley in that connection?

"Mr. McAllister: We object to that as immaterial and irrelevant.

"Exam. Davis: The objection is sustained. The Commission has the full record of all that and years after that; but I am not going into that ancient history on a question of that kind.

"Mr. Vogl: We desire an exception saved, for the record first, that the Examiner permitted opposing counsel to go into that matter somewhat, on cross examination, and we are thereby entitled to go into it on redirect; and further, because the witness stated in answer to the cross examination that the investigations which were made at that time showed considerably more resources than were testified to in the Bamberger case, so called, being Docket 4713.

"Exam. Davis: The testimony in the Bamberger case would show. That is too remote.

"Mr. Vogl: It might show that Mr. Bamberger did not know all of the possibilities of his territory.

"Mr. McAllister: Well, he certainly exercised enough imagination.

"Mr. Vogl: That is your conclusion, Mr. McAllister. That is all, Mr. Paul. In view of the restriction which the Examiner has placed upon our testimony, we will offer no further testimony, except to state, as we have previously stated, we have those witnesses here who would testify on the matters which the Examiner has excluded.

"Exam. Davis: Very well. The record may so show. [fol. 344] What else is there? Has anyone else anything they wish to offer in this proceeding?" (388-389.)

Mr. Paul, called to correct his previous testimony, stated that he misunderstood the question asked him in the morning and that whereas his testimony shows that all of the gilsonite moves out of the Uintah Basin either via the applicant's line and the Uintah Railroad or via wagon or truck to Craig; there is also a considerable tonnage of it

that moves via truck to Price, on the applicant's road (391-392).

(Here the resolution of the Denver Chamber of Commerce was introduced.)

Testimony of Mr. Paul on Cross-examination by Mr. McAllister

The gilsonite that moves to Price is mined near Fort Duchesne which is close to one hundred miles from Price (392).

Testimony of Mr. E. E. Corfman

Mr. Corfman, a Commissioner of the Utah Public Utilities Commission, testified that his Commission was opposed to the granting of the application unless the authority if granted "shall in no wise be construed as prejudicial to any railroad or transporttaion company seeking, now or hereafter, to serve the Uintah Basin." The Uintah Basin is in dire need of transportation and the Public Utilities Commission of Utah desires to go on record that it is unopposed to the application here, if provision be made and an understanding had that the granting of it shall not in any manner preclude or be prejudicial to any applicant who desires to furnish transportation facilities to the Basin (393-395).

Testimony of Mr. B. H. Taylor

Mr. Taylor, Vice President of the applicant and in charge of traffic, testified that he had occupied that position for 28 months; that he is familiar in a general way with the territory lying between the applicant's road and the Moffat Road west of Dotsero and Orestod; that the principal ship- [fol. 345] ping point on Applicant's road is Rifle; that the principal shipping point on the Moffat Road is Craig; that practically midway between Rifle and Craig is the town of Meeker, which is not on any railroad and is in the White

River Valley. From Meeker to Rifle is 42 miles, and from Meeker to Craig is 46 miles. The principal traffic in the territory between the two roads is livestock, and there is no competition between the two roads. That which is ranged closer to Craig is driven to Craig and that which is ranged closer to Rifle goes to Rifle. The feeding facilities are similar in both directions. I would say that there will be not more than fifty cars per year which could be considered competitive. Distance is the controlling factor in the grain shipments also, but very little moves out by railroad. The principal communities in Utah are Vernal, Duchesne, Myton, and Roosevelt. The Vernal business usually goes to Price on the applicant's road, a distance of about 125 miles. From Vernal to Craig the distance is 137 miles. From Duchesne to Price it is 51 miles, and to Craig 189 miles. From Myton to Price it is 80 miles and to Craig 180 miles. From Roosevelt to Price it is 91 miles, and to Craig 169 miles. Practically all of the traffic in that territory has moved through Price because of the greater saving in mileage. Some gilsonite moves from the mines to Craig. The Uintah Railway is used principally by the Barber Asphalt Company. It is practically an asphalt enterprise. There is some gilsonite trucked to Price. The highways from Vernal to Price and from these other points that have been mentioned are superior to those in the opposite direction. I mean from Vernal to Price the roads are superior to those to Craig (395-400). From my traffic experience there is no competitive traffic, as commonly understood by railroad men, in this Utah territory as between the Moffat Road and Applicant (400).

[fol. 346] Testimony of Mr. Taylor on Cross-examination by Mr. Vogl

I have been with the applicant over five years. Prior to being Vice President I was General Freight Agent and then Assistant Freight Traffic Manager, located all of the time in Denver. The shipments of livestock from Rifle approximate 300 cars a year. The shipments from Craig have increased, due principally to the fact that before the Moffat Road used the Tunnel it was the custom of cattle shippers even within a few miles of Craig to drive their cattle to Rifle, because of the uncertain service of the

Moffat Road. Since the Moffat Road service has improved it has taken away traffic that previously moved over applicant's road, but which was contiguous to the Moffat Road (400-402).

The highways between Vernal and Price are more mountainous than they are between Vernal and Craig. The highest point between Vernal and Price is about 9,000 feet, and between Vernal and Craig perhaps 6,500 or 7,000 feet. The grades are easy and the highways are good. The only railroad facility in this territory in Utah is the Uintah Railroad. If a railroad, substantially along the line of the proposed Bamberger road, were built from Craig to Springville or Provo, "I don't think it would create any competition, I think we would be out". I am satisfied that such a road would take all the business from the Basin (401-403).

Mr. McAllister then offered in evidence the report proposed by Examiner William U. Watson, in Finance Docket 4713 (404).

TESTIMONY OF MR. HENRY M. TIDWELL

Mr. Henry M. Tidwell, Superintendent of the Uintah-Uray Indian Agency at Forst Duchesne, testified concerning the amount of lands and the character of the lands within the reservation. He stated that it was the position [fol. 347] of the Indian Department that the interest of the Indians on this reservation would not be served by exclusive control of the Moffat Tunnel by the applicant and the construction of the Cut-Off (408-409). We can't see that the building of the Dotsero Cut-Off would be of any service to us whatever. We are not opposed to it if we can get a railroad but we are if it would exclude the possibility. We think the control of the tunnel would exclude the building of a railroad through the Basin (413).

[File endorsement omitted.]

[fol. 348] EXHIBITS INTRODUCED AT TRIAL

Plaintiffs' Exhibit "F".—Certified copies of application filed Feb. 1, 1930, and exhibits filed at hearings held March

24-25, 1930, at Denver, Colorado, and March 27, 1930, at Salt Lake City, Utah, in Finance Docket No. 8070, Interstate Commerce Commission.

Plaintiffs' Exhibit "G".—Supplemental Report of Interstate Commerce Commission, dated September 15, 1931, in Finance Docket No. 4555.

Defendants' Exhibit No. 1.—Certified copy of Acceptance filed July 17, 1931, in Finance Docket No. 8070, of Interstate Commerce Commission.

Defendants' Exhibit No. 2.—Certified copies of Report and Order, filed April 15, 1929, Order of Commission entered July 27, 1929, and Report and Order of Commission entered September 15, 1931, in Finance Docket No. 4555, Interstate Commerce Commission.

Defendants' Exhibit No. 3.—Certified copy of Recommendations of Public Utilities Commission filed February 18, 1930, in Finance Docket No. 8070, Interstate Commerce Commission.

Defendants' Exhibit No. 4.—Certified copy of Recommendations of Public Utilities Commission filed December 11, 1928, in Finance Docket No. 4555, Interstate Commerce Commission.

NOTE.—The above exhibits accompany this record.

[fol. 349] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

In Equity. No. 909

THE MOFFAT TUNNEL LEAGUE, a Voluntary Association; Uintah Basin Railroad League, a Voluntary Association, Plaintiffs,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Denver and Rio Grande Western Railroad Company, Defendants, and The Denver and Salt Lake Railway Company, Intervenor; The Moffat Tunnel Improvement District and Herbert C. Fairall et al., Members of the Moffat Tunnel Commission, Intervenors; The State of Colorado ex Rel. The Public Utilities Commission of the State of Colorado and Worth Allen et al., Members of said Commission, Intervenors

Suit in Equity Before the Court Constituted as Provided by Section 47 of the Judicial Code (Title 28, U. S. C. A.)

Before Woolley and Thompson, Circuit Judges, and Nields, District Judge

OPINION—Filed June 18, 1932

WOOLLEY, Circuit Judge:

The plaintiffs, by petition in the nature of a bill in equity, ask this court to annul and, by appropriate relief, enjoin the execution of an order of the Interstate Commerce Commission authorizing the Denver and Rio Grande Western Railroad Company to acquire stock control of the Denver [fol. 350] and Salt Lake Railway Company. This control carries with it the right and duty on the part of the Rio Grande to construct a cut-off, known as the Dotsero Cut-off, which when completed will connect the two railroads and bring about transportation and economic changes in the zones affected thereby.

This suit, however, presents only the last phase of a railroad question which has engrossed the attention of the public in Colorado for more than a decade. In order to understand what until lately was a many sided controversy it will be necessary to state its origin, and trace, in bare outline, the currents that have brought it to its present form.

Owing to great distances traversed and broad spaces served, railroads in the west assume perhaps a more serious importance to everyone than in smaller and more densely populated sections of the east. Moreover, problems of railroad construction and operation are there more difficult and sometimes more expensive because of natural barriers. These are matters which enter generally into nearly every railroad question arising in that section and enter particularly into the questions involved in this suit.

The first fact that stands out is one of nature. It is the Continental Divide. That high range of mountains crosses the State of Colorado from north to south and, being inevitably encountered, has to be overcome by any transcontinental railroad system.

Many years ago the Denver and Rio Grande Railroad Company projected a railroad between Denver and Salt

Lake City. The Continental Divide stood in the way of a direct line east and west. While it could not avoid this barrier, the company overcame some of its difficulties by starting its line at Denver, running it southwardly along [fol. 351] the eastern slope of the foothills to Pueblo, thence northwestwardly at relatively low grades along the tortuous bottom of the Royal Gorge. Emerging from this water level, it ascends the Divide by heavy grades to Tennessee Pass at an elevation of about 11,000 feet whence it descends by grades equally heavy and runs on to Salt Lake City, a distance in all of 750 miles.

Later, the Atcheson, Topeka and Santa Fe Railroad and Missouri Pacific Railroad connected with the Rio Grande at Pueblo, thus making links in what in effect is a transcontinental system. But Denver, with the Union Pacific Railroad far to the north, stood solitary and outside the movement of transcontinental traffic. Though it had direct eastern connections, it had no direct western connection. Regarding this as a commercial handicap, it had long dreamed of being situated on a direct road from east to west. Years later, David Moffat, a Denver pioneer, in an effort to realize this dream, organized the Denver and Salt Lake Railway Company, (the Moffat Road) to build a railroad between Denver and Salt Lake City, and at those cities to connect with roads running east and west. Starting at Denver, the line ran westwardly and boldly attacked the Continental Divide by rising over it at very heavy grades and descending at equally heavy grades. On reaching Orestod, it turned northwardly to Steamboat Springs and then westwardly to Craig where it stopped and where the end of the road has remained ever since. In other words, it got about one-third of its way to Salt Lake City, starting at a large commercial center and ending at a place economically unimportant and in a region of very little traffic.

Because of heavy grades and small business, operations of the Moffat Road were so unprofitable, and the prospect of its further extension west was so dim, that in 1919 the [fol. 352] legislature of the State of Colorado passed a law looking to the acquisition of the road, the building of a tunnel through the mountains and the extension of the road through sparsely settled portions of the state as far west as the Colorado boundary. In 1921 the legislature repealed this law and the next year at a special session en-

acted a law which established the Moffat Tunnel Improvement District composed of counties in Colorado through which the road ran and was intended to run, including the City of Denver, and created the Moffat Tunnel Commission with authority to raise money on bonds of the District, being liens upon all real estate therein, and with the money to drive a tunnel through the Divide for use of the Moffat Road and any other road with which it could make terms. Money was raised, and the tunnel constructed. It was then leased to the Moffat Road. Profits increased as costs of operation decreased. Still the road starting some place and going nowhere, could not even with the aid of the tunnel achieve the object for which it was built. Always cherishing the hope of being situated on a transcontinental rail system Denver developed the idea that such a hope could with some approximation be realized if the Rio Grande and Moffat railroads, being somewhat parallel at irregular distances apart, could be connected at the point where they approached one another most closely. That was at places called Dotsero on the Rio Grande and Orestod on the Moffat Road, forty-one miles apart, and—what is most important—it was beyond the western opening of the tunnel and, accordingly, beyond the heavy grades of the Divide. Such a connection, cutting out the Pueblo salient, would shorten the haul from Denver to Salt Lake City one hundred and seventy-three miles at a saving of eight hours in time and much money in operating the shorter distance [fol. 353] and in avoiding heavy grades.

In order to carry out this idea the Moffat Road, through a subsidiary, applied to the Interstate Commerce Commission for authority under a certificate of public convenience and necessity to build the Dotsero Cut-off. At the hearings on its application there were many intervenors representing about all interests, personal, commercial, industrial, corporate, municipal and state, that would be affected in one way or another by a grant or refusal of the authority applied for. Some opposed the move; all were watchful. Particularly the application was opposed by the Rio Grande on a representation that unless it were given trackage rights over the Cut-off when completed and trackage rights over the Moffat Road between Orestod and Denver it could not safely route shipments from Salt Lake over these conections through Denver, and if it could not so

route its through traffic it would, because of heavy grades and the longer haul of one hundred and seventy-three miles, fail in competition with other roads, particularly in handling California deciduous and citrous fruits.

The Commission found that the public convenience and necessity required the construction of the Cut-off but refused its permission to the Moffat Road to build it until the two roads should come to an agreement as to trackage rights over the Cut-off and over the Moffat Road between Orestod to Denver.

The plaintiffs in the instant suit were neither parties nor intervenors in that proceeding and, seemingly, were content with the Commission's order which, as they construed it, tended to improve the business and profits of the Moffat Road and to further the hope of its extension west toward Salt Lake City.

[fol. 354] But the two roads could not agree upon trackage rights, the condition precedent to permission to build the Cut-off.

So matters stood until the Rio Grande began to buy and acquire stock of the Moffat Road. Holding only a minority of its shares, the Rio Grande, on February 1, 1930, applied to the Interstate Commerce Commission, as required by law, for leave to acquire by purchase stock control of the Moffat Road. That application is the genesis of the order of the Commission here in question. Again, nearly everyone in Colorado, represented in one way or another, appeared as intervenors. They included the Moffat Tunnel Improvement District, Moffat Tunnel Commission, Denver Chamber of Commerce, Denver Union Stockyard Company, Denver Real Estate Exchange, Salt Lake and Denver Railroad Company, Utah Shipppers Traffic Association, Moffat Tunnel Taxpayers' Association, and many other bodies not necessary to mention. Among the intervenors however, it is important to note, were the State of Colorado and the two plaintiffs in this suit, the latter objecting on the contentions that if the Rio Grande be allowed to gain control of the Moffat Road and the Cut-off to be built, it would naturally foster traffic from Denver through Orestod and Dotsero to Salt Lake City (and traffic in the reverse direction) over a portion of its old line and would be opposed to the extension of the Moffat Road from Craig to the Uintah

Basin to the permanent injury of northwestern Colorado and eastern Utah, and that the prong of the Moffat Road upwardly extending from Orestod to Steamboat Springs and Craig would become a mere branch line with probably insufficient service.

The differences in the more or less conflicting interests of the many parties to the proceeding were composed by a [fol. 355] finding of the Commission, announced on December 2, 1930, that the proposed stock acquisition would be in the public interest, but at that time no order was entered, and the record was held open for the filing by the Rio Grande of its acceptance of three conditions:

(1) That it should purchase for cash, at not exceeding $155 per share, any share of the capital stock and/or voting trust certificates of the Moffat Road which might be offered for purchase within six months from the date of the order to be entered, (thus protecting minority stockholders); (2) that it, through the Moffat Road, should establish such through routes in connection with any western connections hereafter constructed under the Commission's authority as it might find in subsequent proceedings to be reasonable and in the public interest, (whereby the gateway to northwestern Colorado was kept open); and (3) that it, through the Moffat Road, should commence the construction of the Dotsero Cut-off within six months of the date of an order to be entered authorizing the proposed acquisition and control and should complete such construction within two years from beginning it, (thus insuring an early completion of the project).

On July 17, 1931, the Rio Grande filed a formal acceptance of these three conditions, qualified only by the substitution of itself for the Moffat Road as the medium through which the construction of the Cut-off should be prosecuted. The order which was entered accordingly is the one which the plaintiffs in this suit urge is invalid and pray should be annulled.

There are several questions in this case. The primary and fundamental one, arising on motions to dismiss the petition, concerns the plaintiffs' right to institute and maintain this action to annul the Commission's order, and grows out of the related questions: what interest have they in [fol. 356] the order and what injury would they sustain by its enforcement? While a decision of this question adverse

to the plaintiffs would, so far as this court is concerned, be dispositive of the litigation, we conceive it might not, on review, be dispositive of the controversy. Realizing that it is highly important to the public in Colorado as well as to the corporate interests directly concerned that this litigation should not stagger from tribunal to tribunal but should be brought to an end as speedily as is consistent with orderly procedure, we shall pass upon and decide all questions presented, even if our disposition of the first question should be against the plaintiffs' right to maintain the action.

The initial phase of the first question prompts the inquiry: Who or what are the plaintiffs?

Although it is not necessary in an action of this kind that the plaintiffs should be citizens of a state to show diversity of citizenship and establish jurisdiction, it is necessary that they show who or what they are preliminarily to a determination of their interest in the controversy and their right to maintain the action.

These plaintiffs are unincorporated associations. Who are their personal members is not disclosed. Rather, they represent groups of persons social and civic in character, such as commercial clubs, the Lions, Kiwanis and Rotarians, resident mainly in the three counties of Colorado west of the Moffat Tunnel and in the Uintah Valley of the State of Utah, sections not yet reached by the Moffat Road. We gather from the argument, their main interest is that of members of the public who, feeling that the order of the Commission darkens the hope of a westward extension of the Moffat Road, regard the order as detrimental to public interests in certain parts of the States of Colorado [fol. 357] and Utah. That is, they represent, informally, that part of the public which entertains views opposed to those entertained by other parts of the public which are here as parties or intervenors in opposition to the plaintiffs' action. The latter are not social or civic organizations, but are municipal and state organizations such as the Moffat Tunnel Improvement District, the Moffat Tunnel Commission, and the Public Utilities Commission of the State of Colorado, appearing by the Attorney General of Colorado.

Coming to the second phase of the first question, the plaintiffs have not disclosed, either in the pleadings or by testimony, that they have a legal interest in the Commis-

sion's order. By the same taken they have failed to show that they would sustain injury by its execution. Therefore, if the plaintiffs had first appeared in this controversy by instituting this suit to annul the order, they clearly would fail to show a right to maintain it. But they say, even so, they have a right to maintain the action because of their right to intervene and their actual intervention in the proceedings before the Commission.

It cannot be questioned that such organizations as the Moffat Tunnel League and the Uintah Basin Railroad League, now plaintiffs in this suit, had a right to intervene and be heard in proceedings before the Commission. That right was given them by statute. (Title 28 U. S. C. A. Section 45a Supp.). Unless the statute gives intervenors, as such, a right to institute independent suits to enjoin the action of the Commission (and we find none), their right so to institute suits remains as at general law, which is, first, that voluntary, unincorporated associations of persons do not have a legal capacity to sue, St. Paul Typothetae vs. St. Paul Bookbinders' Union, 94 Minn. 351; Moore [fol. 358] vs. Burns, 60 Ala. 269; New Era Commercial Association, 288 Ill. App. 278; and second, if otherwise capable to sue, they must have a legal right arising from a legal interest, the denial of which inflicts or threatens a legal wrong. Sprunt & Son vs. United States, 281 U. S. 249; Pittsburgh & W. Va. Railway Co. vs. United States, 281 U. S. 479; Pennsylvania Railroad Co. vs. United States, 40 Fed. (2d) 921; Indian Valley R. R. Co. vs. United States, 52 Fed. (2d) 485.

Parties that have a legal interest in the Commission's order are undoubtedly the United States, the two railroad companies, the Moffat Tunnel Improvement District, the Moffat Tunnel Commission, the Public Utilities Commission of the State of Colorado and the State of Colorado, all of which are present as parties or intervenors in this suit by permission of the statute. As all acquiesce in the Commission's order, they are in a very different position from the plaintiffs who have the burden of overturning the order by showing a right to do so.

The Supreme Court distinguishes between the right to intervene in a proceeding before the Commission afforded by the statute and the right to bring a suit to set aside an order of the Commission. Although the contrary might

be gathered from the decisions in the Chicago Junction Case, 264 U. S. 258, 267, Interstate Commerce Commission vs. Diffenbaugh, 222 U. S. 42, the later cases of Sprunt & Son vs. United States, 281 U. S. 249; Pittsburgh & W. Va. Ry. Co. vs. United States, 281 U. S. 479, 486; Hines Yellow Pine Trustee vs. United States, 263 U. S. 143; Pennsylvania Railroad Company vs. United States, 40 Fed. (2d) 291 (through which the evolution of the law can be discerned), clearly rule that an interest which may give a person the right to intervene in a proceeding before the [fol. 359] Commission does not necessarily give him the right to maintain an independent suit to vacate an order of the Commission and that such a suit can be brought and maintained by a person, whether an intervenor or otherwise, only when he shows a legal right which has been violated by the order with a resulting actual or threatened legal injury.

The difference in the statute and the distinction made by the courts are elementary. Intervention in proceedings before the Commission may be commercial, public or quasi public; the right to maintain an action to annul an order of the Commission is purely legal. Though the Commission has quasi judicial powers, its functions are administrative. Its deliberations therefore are informal and open to almost anybody who has anything to say. A legal interest that is actionable and a resultant injury are not legal prerequisites to the right to intervene before the Commission. But when that tribunal has reached a final decision in the form of an order, a suit to set it aside can be brought only by a person with the legal qualifications we have named. Such a suit is original in character; it is not an appeal or a petition to review. We therefore find that the plaintiffs, being voluntary, unincorporated associations, cannot as such maintain this suit; that, aside from this legal infirmity, these associations have not shown such an interest or right in the Commission's order or proved a threat of an injury resulting from its enforcement that would authorize them to maintain this action; and, finally, that this legal disqualification is not cured or aided by the statute, 28 U. S. C. A. Section 45a Supp., in that it does not give them a right to institute this action solely because of their position as intervenors in the proceedings before the Commission. Postponing decision on these findings for

the moment, we shall discuss the other questions in the case [fol. 360] as though the one relating to the plaintiffs' right to sue were not involved.

Of these questions the principal one is:

Did the Commission afford the intervenors (now plaintiffs) a fair hearing?

Realizing that much of this controversy had already been decided by the Commission in the previous Cut-off proceedings, the Examiner was firm in holding the examination to the single ultimate question of public interest involved in the proposed stock purchase and control of one railroad by the other. The intervenor-plaintiffs however wished to open up the controversy from the beginning and introduce evidence on nearly every phase, including the views of witnesses who had, when the controversy was raging, in the public press and on the public platform, expressed themselves in a particular way. An analysis of the hearing indicates that some of the matters excluded were not offered in evidence by plaintiffs' counsel, but by counsel representing other intervenors of which we think the plaintiffs cannot avail themselves in this suit. These were matters for the others to complain about. This they have not done. On the contrary, they are here in support of the order of the Commission. Some of the matters that the intervenor-plaintiffs desired to introduce were not pertinent to the precise issue then involved. Moreover, they had nothing tangible on which to base objections to the stock acquisition. Neither the plaintiffs nor anyone else had a plan to do what all (with the probable exception of the Rio Grande) desired, namely; the extension of the Moffat Road west from Craig to the Uintah Basin. Nor was there any evidence of a likelihood of any plan being made until traffic conditions should inspire one.

[fol. 361] The intervenor-plaintiffs suggest that if the Commission's order should, as they urge, be annulled, the first order authorizing the Moffat Road to build the Cut-off would stand. Yet, if that be true, it would stand with its unperformed condition as to trackage rights, and the situation would remain as it has stood through the years with no immediate prospect of building the Cut-off, which everyone wants, and certainly no prospect even remote of an extension of the Moffat Road from Craig to the west. Such an extension would, without regard to ownership and con-

trol, inevitably depend on traffic conditions. So it appears that the exclusion of evidence was not prejudicial to any rights which the plaintiffs claimed but was only disturbing to their hope that somehow, sometime, in some way the Moffat Road would be projected from Craig westwardly. Yet under the Commission's order the realization of that hope is preserved, for it expressly leaves open the way westward and makes it just as possible to extend the road with the order in force as to extend it with the order annulled. True, certain traffic benefits might conceivably enure to the Rio Grande by the acquisition, of which it might take unfair advantage, but the unfairness of future actions of the Rio Grande, not to be anticipated, can of course be controlled, as is always the case, by future applications to the Commission. Really all that the present order does adversely to the plaintiffs, on their own showing, is to disturb their hope of an early extension of the Moffat Road westward. Without doubt it will, until something else happens, defer their hope. But that, standing alone, is not a legal injury of which the plaintiffs can complain in an action in equity.

The next question is whether the order allowing the [fol. 362] acquisition of one road by the other is in the public interest.

That is a question solely for the Commission. This court has no right to express its views or impose its judgment upon this subject. It may, however, consider the underlying question, whether the order is supported by evidence.

All the evidence is directed to the question of public interest in one phase or another. Practically the whole state of Colorado, as we have shown, was represented as parties or intervenors. Certain parts of the public in Utah were also represented. The main actors were the two railroad companies; the Public Utilities Commission of the State of Colorado; the State of Colorado itself; and, lastly, the Moffat Tunnel Improvement District and its official body the Moffat Tunnel Commission, the parties perhaps most vitally interested. With all these municipal and governmental organizations of the State of Colorado favoring the order of the Commission, we find, as would likly be the case, that the testimony they presented on the question of public interest amply supports the order.

The motions to dismiss the petition are granted and, to make the judgment complete, the prayer of the petition for a preliminary injunction is, after a full hearing, denied, and the prayer for a permanent injunction (on a stipulation of counsel that the case on the hearing should stand submitted for final decision) is denied.

(Sgd.) Woolley, for the Court.

June 18, 1932.

[File endorsement omitted.]

[fol. 363] In United States District Court for the District of Delaware

In Equity. No. 909

The Moffat Tunnel League, a Voluntary Association; Uintah Basin Railroad League, a Voluntary Association, Plaintiffs,

vs.

United States of America, Interstate Commerce Commission, The Denver and Rio Grande Western Railroad Company, Defendants, and The Denver and Salt Lake Railway Company, Intervenor; The Moffat Tunnel Improvement District and Herbert C. Fairall et al., Members of the Moffat Tunnel Commission, Intervenors; The State of Colorado ex Rel. The Public Utilities Commission of the State of Colorado and Worth Allen et al., Members of said Commission, Intervenors.

Final Decree—Filed July 7, 1932

This cause came on regularly for hearing before the Court, constituted as in such case provided by law, and the Court having heard and considered the evidence introduced by the parties hereto, and having heard and considered the [fol. 364] arguments of counsel for all parties to this proceeding, and it having been stipulated by all parties in open Court, in connection with the trial, that the cause be submitted to the Court for decision as on final hearing on the application for permanent injunction, and the Court having reached the conclusion, for the reasons set forth in its opin-

ion filed herein on June 18, 1932, that the motions to dismiss should be sustained, and that the relief prayed for in the petition, including the injunction prayed for, should be denied:

It is, therefore, ordered, adjudged, and decreed that the motions to dismiss, filed by the defendants, be granted, and that the relief prayed for by plaintiffs be, and the same is hereby denied, and the petition is hereby dismissed, with costs against the plaintiffs to be taxed.

Dated at Wilmington, Delaware, this seventh day of July, 1932.

(Sgd.) Victor B. Woolley, United States Circuit Judge. (Sgd.) J. W. Thompson, United States Circuit Judge. (Sgd.) John P. Nields, United States District Judge.

[File endorsement omitted.]

[fol. 365] In United States District Court

[Title omitted]

Petition for Appeal—Filed July 18, 1932

The above named plaintiffs, feeling themselves aggrieved by the decision made and entered in this cause on the 18th day of June, 1932, and by the final decree made and entered [fol. 366] in this cause on the 7th day of July, 1932, do hereby appeal from said decision and decree to the Supreme Court of the United States, for the reasons specified in the Assignment of Errors which is filed herewith, and they pray that this appeal be allowed and that citation issue as provided by law, and that the record or a transcript of the record, proceedings, and papers upon which said decree was based, duly authenticated, may be sent to the Supreme Court of the United States at the City of Washington, D. C., and your petitioners further pray that a proper order fixing the amount of bond to be required of them to perfect their appeal, be made.

(Sgd.) John J. Morris, Jr., (Sgd.) Albert L. Vogl, Solicitors for Plaintiffs.

[fol. 367] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

And now, to-wit, this 18th day of July, A. D. 1932, upon reading and considering the foregoing petition for appeal, with assignments of error, upon motion of John J. Morris, Jr., Esq., solicitor for plaintiffs,

It is ordered by the Court that the appeal prayed be and hereby is allowed and the amount of appeal bond to be entered by the appellants be and hereby is fixed at the sum of Five Hundred Dollars ($500.00).

It is further ordered by the Court that the Clerk be and he hereby is authorized and directed to withdraw from the files of this court and transmit on said appeal to the Clerk of the Supreme Court of the United States at Washington, D. C., the original testimony and exhibits filed in this court by the respective parties, or a condensed statement of such testimony, instead of a transcript thereof, as provided in Section 47-A, Title 28, U. S. C. A.

(Sgd.) John P. Nields, D. J.

[fol. 368] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 18, 1932

[fol. 369] And now, on this the 18th day of July, A. D. 1932, come the above named plaintiffs by John J. Morris, Jr. and Albert L. Vogl, their solicitors, and hereby assign the following errors in the decree entered in the above entitled cause on the 7th day of July, A. D. 1932 to the prejudice of these plaintiffs.

That the Court erred in determining and decreeing:

1. "That the plaintiffs being voluntary, unincorporated associations, cannot, as such, maintain this suit".

2. "That these associations have not shown such an interest or right in the Commission's order or proved a

threat of injury resulting from its enforcement that would authorize them to maintain this action".

3. That Section 45A Supp. of Title 28, U. S. C. A. does not give these plaintiffs the right to institute this suit.

4. That the Interstate Commerce Commission did not improperly exclude evidence offered by plaintiffs.

5. That these plaintiffs cannot be heard to complain of the exclusion by the Interstate Commerce Commission of evidence offered at such hearing by other interveners unless the same evidence was reoffered by the plaintiffs.

6. In sustaining the motions of defendants to dismiss the petition.

7. In denying the petition of the plaintiffs for preliminary injunction.

8. In denying the petition of the plaintiffs for permanent [fols. 370-652] injunction.

9. In entering final judgment and decree dismissing this suit.

For which errors the plaintiffs pray that said decree be reversed and the case be remanded to the District Court with instructions to grant the plaintiffs' petition for permanent injunction.

(Sgd.) John J. Morris, Jr., (Sgd.) Albert L. Vogl,
Solicitors for Plaintiffs.

[File endorsement omitted.]

[fol. 653] PLAINTIFFS' EXHIBIT NO. F

INTERSTATE COMMERCE COMMISSION, WASHINGTON

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the attached are true copies of the following: Application filed February 1, 1930, and Exhibits filed at the hearings held March 24 and 25, 1930, at Denver, Colorado, before Examiner H. C. Davis, and at the hearing held March 27, 1930, at Salt Lake

City, Utah, before Examiner Davis, in Finance Docket No. 8070, Denver & Salt Lake Railway Company Control, the originals of which are now on file and of record in the office of this Commission.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 14th day of December, A. D. 1931.

George B. McGinty, Secretary of the Interstate Commerce Commission. (Seal Interstate Commerce Commission.)

[fol. 654] BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 8070

In the Matter of the Application of THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a Delaware Corporation, Pursuant to Paragraph 2 of Section 5 of the Interstate Commerce Act, for an Order Approving and Authorizing the Acquisition by Applicant of Control of the Denver and Salt Lake Railway Company by the Purchase of Stock

Dated January 30, 1930

[fol. 655] BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket No. —

In the Matter of the Application of THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a Delaware Corporation, Pursuant to Paragraph 2 of Section 5 of the Interstate Commerce Act, for an Order Approving and Authorizing the Acquisition by Applicant of Control of the Denver and Salt Lake Railway Company by the Purchase of Stock

To the Interstate Commerce Commission:

The Denver and Rio Grande Western Railroad Company respectfully makes application to the Interstate Commerce Commission under paragraph 2 of Section 5 of the amended Interstate Commerce Act, and shows:

A. The exact corporate name of the applicant is The Denver and Rio Grande Western Railroad Company.

B. The applicant is a carrier by railroad engaged in the transportation of passengers and property subject to the Interstate Commerce Act.

C. This application is made under paragraph 2 of Section 5 of the Interstate Commerce Act and under any other applicable provisions of said Act, and has for its object the securing of an order of the Interstate Commerce Commis- [fol. 656] sion approving and authorizing the acquisition by The Denver and Rio Grande Western Railroad Company, the applicant, of control of The Denver and Salt Lake Railway Company by the purchase of capital stock.

Briefly, the reasons which the applicant has to show that such acquisition will be in the public interest are:

The applicant was re-organized in 1924 under a certain Plan and Agreement of Re-organization, dated January 15, 1923, as modified by a supplemental Agreement, dated February 29, 1924. The Plan and Agreement of Re-organization states "that the policy to be pursued by the Board of Directors of the New Company shall be (1) primarily to operate and develop the railroad system and to conduct and expand business of the New Company in the interest of that Company, and (2) to encourage the creation of a short line from Denver to Salt Lake City by the utilization of the existing line from Salt Lake City to Dotsero, and a line from the latter point through the proposed Moffat Tunnel to Denver". (The Denver and Rio Grande Western Railroad Company Re-organization, Finance Docket 3169, 82 I. C. C. 745).

The Denver and Salt Lake Railway Company was re-organized in 1926 under a certain Plan and Agreement of Re-organization effective as of November 20, 1925. The re-organized Company acquired all of the properties of The Denver and Salt Lake Railroad Company, hereinafter briefly described and a more complete description of which appears in the report of the Interstate Commerce Commission in Freeman and Boettcher vs. A. T. & S. F. Railway Company, 73 I. C. C., 178 (Denver and Salt Lake Re-organization, Finance Docket 7747—117 I. C. C. 397).

[fol. 657] Subsequently, the Moffat Tunnel was constructed by the Moffat Tunnel Improvement District and thereafter The Denver and Salt Lake Railway Company leased from the Moffat Tunnel Improvement District the

Moffat Tunnel and approach tracks connected therewith, for a term of 50 years from January 6, 1926, with the option to renew or extend the same for an additional period of 49 years, and the option to continue thereafter as year to year tenant upon the payment of rental or the assumption of other obligations as specified in said contract of lease as supplemented by a certain supplemental contract between the parties, dated March 25, 1927.

The Denver and Salt Lake Railway Company owns and operates railways extending from the City of Denver, State of Colorado, in a westerly direction to a point in the vicinity of Orestod, from which point it is proposed to construct the Dotsero Cut-Off, in respect of which application has been made to this Commission by the Denver and Salt Lake Western Railroad Company, a controlled subsidiary of The Denver and Salt Lake Railway Company, for a certificate of public convenience and necessity. In its report, dated April 15, 1929, upon said application, it was found by the Commission that the present and future public convenience and necessity required the construction of the line of railroad proposed by the Denver and Salt Lake Western Railroad Company upon condition that The Denver and Rio Grande Western Railroad Company be permitted to operate over said line and over the Moffat Road between Orestod and Utah Junction, Colorado, on fair and reasonable terms to be approved by the Commission. (In the Matter of the Proposed Construction by The Denver and Salt Lake Western Railroad Company, Finance Docket No. 4555.)

[fol. 658] From time to time since the construction of the Moffat Tunnel, negotiations have been conducted by the applicant with representatives of The Denver and Salt Lake Railway Company for the purpose of reaching an agreement for the establishment of a line from Denver to Salt Lake City as contemplated by the Plan and Agreement under which the applicant was re-organized, by the granting of trackage to the applicant over sections of the line of The Denver and Salt Lake Railway Company and the construction of the Dotsero Cut-Off for the joint account of the applicant and The Denver and Salt Lake Railway Company under terms providing for its exclusive use by the applicant. On May 11, 1929 the applicant submitted to this Commission pursuant to its order of April 15, 1929,

in Finance Docket No. 4555, a draft of agreement with The Denver and Salt Lake Railway Company setting forth the terms and conditions which the applicant was willing to accept as governing its operation over the line of said Company between Utah Junction and Orestod (including the Moffat Tunnel) and a draft of an agreement and lease with The Denver and Salt Lake Railway Company which the applicant was willing to accept as governing the construction of an operation over the proposed Dotsero Cut-Off. These proposed agreements had not been executed either by the applicant or by The Denver and Salt Lake Railway Company when the Interstate Commerce Commission, on December 9, 1929, adopted its Final Plan in Docket No. 12964, for the consolidation of railway properties of the United States into a limited number of systems, under which Plan The Denver and Salt Lake Railway Company is included with the applicant in System No. 18, based on Missouri Pacific Railroad Company.

[fol. 659] After the Commission's Final Consolidation Plan had been promulgated, an opportunity was afforded the applicant to acquire and it has acquired, at a cost of $155 per share, 21,334 shares of the capital stock without par value of The Denver and Salt Lake Railway Company represented by stock certificates covering 4,877 shares, and voting trust certificates covering 16,457 shares. The voting trust certificates are issued under a Voting Trust Agreement dated April 1, 1927, filed herewith, whereby five Voting Trustees are authorized to vote the stock of The Denver and Salt Lake Railway Company for the election of Directors and for other purposes until April 1, 1937, but the Voting Trust may be terminated at any time by the Voting Trustees.

The applicant has also entered into an agreement, dated January 21, 1930, with George H. Burr & Company, filed herewith, pursuant to which the applicant has agreed to purchase 7,635 additional shares of the capital stock of The Denver and Salt Lake Railway Company represented by actual stock or voting trust certificates, this proposed purchase, however, being subject to the prior approval and authorization of the Interstate Commerce Commission.

The aggregate amount of said additional shares of stock of The Denver and Salt Lake Railway Company, together with the shares of stock of said Company already purchased

by the applicant, will amount to 28,969 out of an outstanding issue of 50,000 shares, or 57.938% of said issued and outstanding stock. Accordingly, the applicant files this application for the purpose of obtaining the approval and authorization of the Interstate Commerce Commission of the acquisition by the applicant of control of The Denver [fol. 660] and Salt Lake Railway Company through the purchase of 7,635 shares of the capital stock of said Company additional to the 21,334 shares of the capital stock of said Company already owned by it, and the applicant submits that such acquisition will be in the public interest for the reason that it will make practicable, on advantageous terms, a realization of the policy of the applicant to which its Board of Directors, as aforesaid, is committed by the Plan and Agreement of Re-organization, and will result in the creation of a new short single line route between Denver and Salt Lake City conforming to the Consolidation Plan of the Commission as embodied in its order of December 9, 1929 in Docket No. 12964.

D. The names, title and post office address of the officers to whom correspondence in regard to this application should be addressed are Messrs. T. M. Schumacher and William H. Williams, Managing Committee, The Denver and Rio Grande Western Railroad Company, 120 Broadway, New York City.

E. (1) The applicant is a corporation organized under the laws of the State of Delaware, and is authorized to operate and does operate railroads in the States of Colorado, Utah and New Mexico.

E. (2) The Denver and Salt Lake Railway Company is a corporation organized under the laws of the State of Delaware, and is authorized to operate and does operate railroads in the State of Colorado.

F. The making and filing of this application was authorized and approved by the Executive Committee of the Board of Directors of the applicant at a meeting held in the City of New York, State of New York, on the 23rd day of January, 1930.

[fol. 661] G. The applicant does not exercise any control over The Denver and Salt Lake Railway Company at the time of the making of this application, but owns and holds

the following amounts of its capital stock and/or voting trust certificates as compared with total amounts outstanding and total amounts held by others, as respectively indicated:

Description of security	Total outstanding	Held by applicant	Held by others
Capital Stock and/or Voting Trust Certificates	50,000	21,334	28,666

H. The applicant and The Denver and Salt Lake Railway Company have no common or interlocking officers or directors.

I. The total mileage operated by The Denver and Salt Lake Railway Company is approximately 255.19 miles, all of which is located in the State of Colorado. The principal terminii of The Denver and Salt Lake Railway Company are Denver, Utah Junction and Craig. The principal point of interchange between the applicant and The Denver and Salt Lake Railway Company is a point at or near Denver, in Adams County, Colorado.

J. The lines of the applicant and of The Denver and Salt Lake Railway Company are neither parallel nor competitive.

K. (1) The consideration agreed upon for the stock and/or voting trust certificates of The Denver and Salt Lake Railway Company proposed to be purchased from George H. Burr & Company is the cash sum of $155 per share for 7,635 shares thereof, plus actual carrying charges from the date of purchase by said George H. Burr & Com- [fol. 662] pany to the date of purchase by this Company. Such charges are accruing from January 22, 1930 at the rate of 5% per annum.

K. (2) Neither the stock nor the voting trust certificates representing the stock of The Denver and Salt Lake Railway Company is listed on the New York Stock Exchange or Curb Exchange or has any recognized quotation or ascertainable market value.

K. (3) The estimated value of said stock is not less than $155 per share and the basis of such estimate is the earning power of the railway of The Denver and Salt Lake

Railway Company, as shown by the financial statements filed herewith, and the greater potential earning power of said lines integrated and co-ordinated with the lines of the applicant and other lines in the proposed System No. 18, hereinbefore referred to.

Exhibits

The following exhibits, filed herewith or heretofore filed in the Bureau of Finance of the Interstate Commerce Commission, are made a part hereof:

Exhibits	Description of document

1. Applicant's Articles of Incorporation and By-Laws and amendments to date, duly certified, are filed in Finance Docket 5418. The Articles of Incorporation and By-Laws and amendments to date, duly certified of The Denver and Salt Lake Railway Company are filed in Finance Docket 5547.

2. Resolutions of Executive Committee of the Board of Directors of the applicant.

3. Key map.

[fols. 663-697] 4. Copies of letters constituting contract between applicant and George H. Burr & Company and copy of Voting Trust Agreement, dated April 1, 1927.

5. Opinion of Counsel of the applicant.

6. Income Account, (5 years), Profit and Loss Account and General Balance Sheet of the applicant. Income Account (2 years and eleven months) Profit and Loss Account and General Balance Sheet of The Denver and Salt Lake Railway Company.

Prayer

Wherefore the applicant respectfully asks:

(1) That the Commission find that acquisition by applicant of control of The Denver and Salt Lake Railway Company by purchase of capital stock will be in the public interest.

(2) That the Commission approve and authorize the acquisition by applicant of control of The Denver and Salt

Lake Railway Company by the purchase of stock and/or voting trust certificates representing stock of said Company from George H. Burr & Company, as set forth in this application.

(3) That the Commission grant any other and further relief to which the applicant may become entitled.

The Denver and Rio Grande Western Railroad Company, by T. M. Schumacher, William H. Williams, Managing Committee.

F-3663

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 4555

PROPOSED CONSTRUCTION BY DENVER & SALT LAKE WESTERN RAILROAD COMPANY

Submitted March 11, 1929. Decided April 15, 1929

1. Present and future public convenience and necessity found to require the construction by the Denver & Salt Lake Western Railroad Company of a line of railroad in Eagle County, Colo., upon condition that the Denver & Rio Grande Western Railroad Company be permitted to operate over said new line of railroad and over the Denver & Salt Lake Railway between Orestod and Utah Junction, Colo., on fair and reasonable terms.
2. Issue of certificate deferred and record held open pending the filing and approval of proposed trackage agreements.

Elmer L. Brook for applicant.

Winslow S. Pierce and *Henry McAllister* for Denver & Rio Grande Western Railroad Company, respondent; *Julien N. Bamberger* for Salt Lake & Denver Railroad Company, respondent.

Norton Montgomery and *Erskine R. Myer* for Moffat Tunnel Improvement District and Moffat Tunnel Commission; *J. S. Earley* for Utah Manufacturers Association; *Judge Corfman* for Public Utilities Commission of State of Utah; *T. S. Wood* and *Charles H. Rankin* for Public Utilities Commission of State of Colorado; *Harry S. Dickinson* for Denver Chamber of Commerce; *Fred L. Emerson* for Colorado Manufacturers & Merchants Association; *F. C. Merrill* for Grand Junction Chamber of Commerce; *W. S. McCarthy* for Salt Lake City Chamber of Commerce, Roosevelt Chamber of Commerce, Dry Gulch Irrigation Company, Ouray Valley Irrigation Company, Business Mens Club of Roosevelt, and city of Vernal; *C. F. Tucker* for Lions Club of Vernal and people of Uintah Basin.

REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS MEYER, EASTMAN, AND WOODLOCK

BY DIVISION 4:

Exceptions were filed to the report proposed by the examiner.

On December 24, 1924, the Denver & Salt Lake Western Railroad Company, a corporation organized under the laws of Wyoming for the purpose of engaging in interstate commerce, filed an application under paragraph (18) of section 1 of the interstate commerce act for a certificate that the present and future public convenience and necessity require the construction by it of a line of railroad extend-

ing from Orestod, a point on the Denver & Salt Lake Railroad, southwesterly to Dotsero, a point on the Denver & Rio Grande Western Railroad, a distance of 41.3 miles, all in Eagle County, Colo. Permission is also requested under paragraph (18) of section 15a of the act to retain the excess earnings of the proposed construction. After action on the application had been suspended at the applicant's request, a hearing was held for us by the Public Utilities Commission of Colorado in September, 1928, briefs were filed, and oral argument was had.

The proposal, either with or without conditions, is favored by several communities in Colorado situated west of Dotsero, notably Grand Junction and Glenwood Springs, on the ground that the rail distance from these places to Denver, Colo., would be much shortened by the building of the line. The Chamber of Commerce of Denver and the Moffat Tunnel Commission also favor it. The Chamber of Commerce of Salt Lake City, Utah, as well as other civic bodies in Utah which desire the building of a railroad through the Uintah Basin in that State, generally take the position that the application should not be granted to the prejudice of that project. Such a line is proposed by the Salt Lake & Denver Railroad Company, which opposes the granting of the application. The Denver & Rio Grande Western Railroad Company (hereinafter called the Rio Grande) is in favor of the applicant's proposal under conditions that would protect its interests. The Colorado commission recommends that the application be granted conditioned, for a reasonable time, upon the making of a trackage contract to permit the Rio Grande to operate under trackage rights between Dotsero and Denver.

The applicant is a subsidiary of the Denver & Salt Lake Railway Company, a successor by reorganization of the Denver & Salt Lake Railroad Company. The line of the parent company, popularly called the Moffat line or road, operates from Denver westward 232 miles to Craig, Colo. It has recently been improved by the building of an important tunnel on the Continental Divide between Denver and Orestod. The Moffat Tunnel District, created by an act of the Colorado Legislature, embraces the territory in Colorado tributary to the Moffat line, including a possible extension west of Craig, and the city and county of Denver. Bonds in the amount of $15,470,000 have been issued in financing the cost of the railway and water tunnels, which are built side by side. The railway company pays, for its use of the tunnel, a rental based on a principal sum of approximately $7,000,000. The large financial interest of Denver in the development of the Moffat road is reflected in the fact that the owners of real estate in that city and county are ob-

ligated, under the act, to meet 88 per cent of any deficit in principal or interest on the bonds issued.

As estimated by the applicant, the proposed cut-off would cost $2,555,000 to build. As estimated by an engineer of the Rio Grande, using standards of construction claimed to be necessary for a transcontinental line, the cost would be $3,856,841. It is probable that the actual cost will be not less than $3,000,000. Financing by the issuance of 6 per cent bonds is contemplated, and is said to be assured of success, but no definite plan for it has been determined. Construction is expected to consume 10 or 12 months. Traffic at local points on the proposed line is not considered of much immediate importance. The applicant's estimates, showing a total tonnage of 435,900, and a total of 135,900 passengers, to be transported during the first year of operation, are largely based on assumed percentages of distribution of traffic as between the proposed route and the existing route of the Rio Grande. However, nearly one-fourth of the freight traffic is expected to be made up of through business not at present passing through Denver, and of traffic originating at Denver but now moved over other routes. According to testimony for the Rio Grande, that carrier transported 487,349 tons of freight and 103,300 passengers in 1927 between Dotsero and Denver. The revenues from this business were, respectively, $3,459,055 and $1,648,807. The applicant estimates total revenues of $2,122,000 and net railway operating income of $619,300 for the first year of operation, with substantial increases during the succeeding four years. These amounts represent the increase in revenues of the Denver & Salt Lake from the proposed cut-off. The actual earnings to be realized are obviously dependent to a great extent upon the future traffic relations between the applicant and the Rio Grande. The Rio Grande contends that if these relations are opposed, the annual earnings of the applicant would fall short by $72,000 of paying 5.5 per cent on the cost of the proposed construction. The testimony of the parties is widely at variance on this point.

Considering the cut-off as a link in a through route between Denver and Salt Lake City, the rail distance between these points via the cut-off would be materially less than by any existing route. Via the Rio Grande, through Pueblo, Colo., the distance is 745 miles, via the Union Pacific through Borie, Wyo., and Ogden, Utah, it is 614 miles, and via the Dotsero cut-off it would be 572 miles. Between Dotsero and Denver the distance by the existing line of the Rio Grande is about 343 miles, by the proposed route about 170 miles. As compared with the maximum grade of 3.33 per cent, opposed to eastbound traffic on the Rio Grande line via Pueblo, the proposed route would have a maximum grade of 2 per cent. In the

opposite direction, the Rio Grande has a maximum grade which is somewhat more favorable than that of the Moffat line including the cut-off. In point of total vertical distance traversed, commonly known as "rise and fall," the Dotsero route is far superior to the Rio Grande, having but half the amount existing on that line between Denver and Dotsero. Considered in its physical aspect, the Dotsero connection promises an important transportation improvement. In addition, it would provide a long-desired western outlet for the Moffat road, and the fulfillment of a major purpose for which the Moffat Tunnel was built. That there is need for the short line which the cut-off will provide is recognized by the president of the Rio Grande. The effect on rates was not developed in the record.

Owing to the competition which would arise between the Moffat line extended to Dotsero, and the Rio Grande between Dotsero and Denver, the two interests have sought to reach an agreement as to the terms and methods of handling traffic between these points, but have been so far unable to do so. The Rio Grande desires to lease the Dotsero cut-off and to acquire trackage rights over the Moffat line between Orestod and Utah Junction, near Denver. The Rio Grande insists on a permanent arrangement of this sort as a protection against the possible extension of the Moffat line west from Craig, thus opening a new competing transcontinental route, or the possible acquisition of the Moffat line by a competitor of the Rio Grande. The Rio Grande wishes to be assured of reliable service over the Moffat, and control of train schedules so that eastern connections at Denver may be properly accommodated. Its aim is to be in position successfully to compete for transcontinental business. Rather than to interchange traffic with the applicant on a rate division basis, without adequate permanent protection of its interests, the Rio Grande would be disposed to build a new line between Minturn, Colo., and Denver. This would be 124 miles in length, would cost about $20,000,000, and would require three years to construct.

Operating via the Dotsero cut-off, the Rio Grande would have but two engine districts between Grand Junction and Denver, while a total of three would be required in the same distance if each road were operated separately. With independent operation it was estimated that only one hour would be saved in through freight movement as compared with the running time via Pueblo. The advantages of one-line haul, rather than interchange between the two roads at Dotsero, were pointed out. The Western Pacific Railroad delivers at present more than half its eastbound perishable freight to the Union Pacific at Salt Lake City. In the event the Rio Grande acquires trackage rights over the Moffat line, this freight

could be diverted to the new route. The possibilities of its development, under suitable inter-company traffic arrangements, seem to be considerable.

It is important to consider the probable effect of the proposed line upon the Rio Grande. In 1927, the net railway operating income of that carrier was $6,391,040, and its net income was $2,290,886. This net income, however, does not reflect interest and sinking fund payments on $29,808,000 principal amount of general-mortgage bonds issued in the reorganization of 1924. Under the terms of that mortgage, these payments during the first five years, ending February 1, 1929, may be deferred until the bonds mature, provided no dividends are paid before then. The Rio Grande has not made the payments, nor has it declared any dividends on its stocks. Part of the surplus has been spent on the property. The statistician of the Rio Grande estimated that the rate of return earned would be reduced from approximately 4.74 per cent to approximately 4 per cent during the first year of operation of the cut-off, if the applicant's forecast of traffic and revenue were taken as correct. It is unnecessary here to describe the physical handicaps under which the Rio Grande operates. Any proposal which would tend to produce an injurious effect upon the interests of that property should be considered very carefully. Control of the Rio Grande is equally divided between the Western Pacific Railroad Corporation and the Missouri Pacific Railroad Company through stock ownership.

If the application be granted and the Dotsero cut-off constructed, one of three possible situations may exist, namely: (1) Traffic interchanged between the applicant and the Rio Grande at Dotsero, the Rio Grande operating in competition for through business; (2) traffic interchanged at Dotsero, the Rio Grande cooperating with the applicant in handling through business; (3) some form of contract between the carriers by which the Rio Grande would operate through to Denver over the cut-off and Moffat line. Evidence was introduced by the Rio Grande to show the probable net income of the applicant, and the probable change in net income of the Rio Grande, in each of these cases. Without cooperation or a trackage agreement between the carriers, it would be to the interest of the Rio Grande, and also of the Western Pacific, to route as much business as possible by way of Pueblo. Cooperation by the Rio Grande, without trackage rights over the Dotsero and Moffat lines, is intended to mean some working plan for service and rate divisions, but no solicitation of traffic on the part of the Rio Grande.

Using the present amount of traffic handled by the Rio Grande as a basis, it was estimated that under the conditions described in case 1, the Rio Grande would lose $384,005 annually, and under case 2, if

all through business went over the cut-off, it would lose $1,068,242. These amounts apply to the first five years of operation. The following represents the Rio Grande's predictions, assuming a considerable increase over present traffic in each instance:

	Average annual net income for first five years	Total net income for first five years
Case 1		
Loss to the Moffat line	$72,404	$362,018
Loss to the Rio Grande	248,462	1,242,309
Case 2		
Gain to the Moffat line	577,577	2,887,887
Loss to the Rio Grande	523,535	2,617,674
Case 3		
Gain to the Moffat line	740,629	3,703,146
Gain to the Rio Grande	75,154	375,770

The combined average annual net income of both roads, under the trackage-rights plan would exceed that under the cooperation plan by $761,741, which is accounted for principally by the difference in cost of traffic solicitation, passenger service, and handling mail and express traffic. The effect of the trackage arrangement on the Rio Grande's earnings, which would not be favorable until the fifth year, is reckoned on the terms of a tentative agreement by which the Rio Grande would lease the cut-off and have trackage rights over the Moffat line. After the fifth year, when it is thought that normal conditions will have been reached, the estimates indicate an average annual net income of $738,000 for the Moffat and $372,000 for the Rio Grande.

While the terms of the operating agreement are uncertain, and although the figures shown in the foregoing list are also necessarily approximate in other respects, it is manifest that the interest of the carriers as a whole would best be served under an arrangement whereby the Rio Grande could operate on fair and equitable terms over the cut-off and the Moffat line between Dotsero and Utah Junction. The evidence is conclusive that the cut-off would be of distinct advantage as a transportation facility and that the public interest requires its construction for operation in the manner just stated. If operated by the applicant under active traffic opposition from the Rio Grande, the result would certainly mean financial loss to the Rio Grande and possibly to the Moffat line road as well. The construction of a competitive short line by the Rio Grande, such as a Minturn-Denver connection, would involve a duplicate investment in transportation facilities which, in the light of any

traffic conditions now foreseen, should not be permitted unless it be found that the traffic situation here involved can be solved in no other manner. The carriers have indicated a willingness to enter into a contract, if the terms can be agreed upon, and every consideration in the case points to the necessity that this be done.

Upon the facts presented we find that the present and future public convenience and necessity require the construction of the line of railroad proposed by the applicant, upon condition that the Rio Grande be permitted to operate over said line and over the Moffat road between Orestod and Utah Junction, Colo., on fair and reasonable terms to be approved by us.

An order will be entered requiring, within 30 days from the date of such order, that the Rio Grande file with us, and furnish to the applicant, attested copies of a draft of a contract or agreement to be made with the applicant and/or the Moffat road, setting forth the terms and conditions which it, the Rio Grande, is willing to accept as governing its operation over the proposed cut-off and the Moffat line; that within 30 days from the filing of said proposed contract, the applicant and/or the Moffat road shall execute said contract with the Rio Grande subject to our approval, or, if unwilling to do so, shall file with us and with the Rio Grande an attested copy of a draft of a contract setting forth the terms and conditions desired by them.

Upon receipt by the commission of the forms of contract called for, further consideration will be given to the record and an order entered, certificate issued, or hearing held, as may at that time be found proper.

ORDER

Entered April 15, 1929

A hearing and investigation of the matters and things involved in this proceeding having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That, within thirty days from the date hereof, the Denver & Rio Grande Western Railroad Company file with this commission, and at the same time file with the Denver & Salt Lake Western Railroad Company and the Denver & Salt Lake Railway Company, attested copies of a draft of a contract or agreement with either or both of those companies setting forth the terms and conditions which it, the Denver & Rio Grande Western Railroad Company, is willing

to accept as governing its operation over the proposed Dotsero cut-off and the line of the Denver & Salt Lake Railway.

It is further ordered, That unless the Denver & Salt Lake Western Railroad Company and/or the Denver & Salt Lake Railway Company execute with the Denver & Rio Grande Western Railroad Company the contract or agreement provided for in the preceding paragraph of this order, which contract shall be subject to modification or approval by this commission, the Denver & Salt Lake Western Railroad Company and/or the Denver & Salt Lake Railway Company shall file with this commission and with the Denver & Rio Grande Western Railroad Company, within 30 days after the filing of said draft of contract by the Denver & Rio Grande Western Railroad Company, attested copies of a draft of a contract or agreement setting forth the terms and conditions desired by them.

By the commission, division 4.

[SEAL.] GEORGE B. MCGINTY,
Secretary.

154 I. C. C.

Finance Docket 8070

EXHIBIT 4

Witness: Williams

The Denver and Salt Lake Railway Company

Income Account

Operating Revenues:	1929	1928	1927	1926*	1925*
Transportation:					
Freight	$3,471,169.43	$3,540,316.37	$3,546,551.33	$3,670,596.93	$3,269,834.26
Passenger	198,691.27	254,472.17	305,164.98	302,876.17	299,768.51
Excess Baggage	792.93	1,140.72	1,383.08	1,790.35	1,485.04
Parlor and chair car	6,685.25	6,439.00	3,088.30	3,542.35	3,526.11
Mail	*201,945.97	82,526.75	112,453.29	160,252.75	175,027.16
Express	40,011.02	48,323.38	48,788.40	44,311.60	39,870.38
Other passenger train	847.26	455.11	1,097.38	485.67	566.21
Milk	12,268.28	11,595.71	12,519.65	11,842.49	10,533.10
Switching	10,581.05	10,726.78	10,443.93	14,448.15	9,654.93
Special service train	.....	.....	.....	.....	.....
Other freight train	.....	.....	.....	.....	.....
Total Transportation	$3,942,992.46	$3,955,995.99	$4,041,490.34	$4,210,146.46	$3,810,265.70
Incidental:					
Station and train privileges	$3,833.73	$3,844.67	$4,251.23	$4,243.25	$4,227.55
Parcel room	76.37	158.24	390.10	349.90	297.96
Storage—Freight	415.73	499.54	542.36	668.55	636.18
Storage—Baggage	260.20	250.40	347.58	425.88	403.02
Demurrage	1,525.00	2,380.25	5,039.50	6,312.00	8,386.00
Telegraph and telephone	8,172.19	8,127.40	6,649.19	4,486.59	4,300.41
Rents of buildings and other property	1,320.00	1,400.00	1,800.00	1,800.00	1,920.00
Miscellaneous	22,534.99	39,006.45	49,775.63	40,014.64	58,883.89
Total Incidental	$38,138.21	$55,666.95	$68,795.59	$58,300.81	$79,055.01
Total Operating Revenues	$3,981,130.67	$4,011,662.94	$4,110,285.93	$4,268,447.27	$3,889,320.71

The Denver and Salt Lake Railway Company

Income Account

	1929	1928	1927	1926*	1925*
Operating Expenses:					
Maintenance of way and structures	$660,392.63	$824,448.07	$1,108,932.64	$1,289,399.01	$875,945.78
Maintenance of equipment	785,256.42	902,748.81	1,217,467.17	1,323,389.32	1,120,855.20
Traffic	26,703.17	22,995.46	21,635.64	21,318.06	18,381.95
Transportation	610,268.57	687,738.36	919,422.27	999,829.86	1,027,757.22
General	163,992.51	129,485.50	122,320.19	114,953.11	78,397.57
Transportation for Investment—Cr.	Cr 19,966.15	Cr 31,094.14	Cr 14,276.00	Cr 22,988.45	.....
Total Operating Expenses	$2,226,647.15	$2,536,322.06	$3,375,501.91	$3,725,900.91	$3,121,337.72
Net Operating Revenue	$1,754,483.52	$1,475,340.88	$734,784.02	$542,546.36	$767,982.99
Tax Accruals	$156,447.04	$131,569.78	$87,730.14	$71,628.82	$70,687.80
Uncollectible revenues	86.53	128.59	1,005.30	19.46	231.59
Operating Income	$1,597,949.95	$1,343,642.51	$646,048.58	$470,898.08	$697,063.60
Non-Operating Income:					
Hire of freight cars—Receipts	$193,121.68	$206,297.22	$177,843.22	$171,467.60	$167,439.75
Rent from locomotives	23,116.35	29,519.79	23,601.54	12,471.73	7,737.12
Rent from passenger train cars	473.00	242.00	811.00	352.00	744.00
Rent from work equipment	9,236.18	11,362.82	7,265.71	3,410.09	836.49
Income from lease of road	.....	.....	.....	.....	.....
Miscellaneous rent income	5,804.40	7,018.47	5,723.25	3,013.36	4,598.29
Income from funded securities	86,971.11	99,843.14	58,630.89	.....	.....
Income from unfunded securities and accounts	49,367.47	19,214.98	24,388.19	17,465.92	13,799.46
Miscellaneous income	40.58	.....	.....	Dr. 208,067.00	.....
Total Non-Operating Income	368,130.77	373,498.42	298,263.80	113.70	195,155.11
Gross Income	$1,966,080.72	$1,717,140.93	$944,312.38	$471,011.78	$892,218.71

[fols. 833c–923]

Deductions from Gross Income:					
Hire of freight cars—Payments	$139,884.14	$155,855.03	$174,959.18	$203,804.33	$195,304.94
Rent for locomotives	.....	.....	.....	.....	.....
Rent for passenger train cars	4,396.70	5,930.90	362.80	1,600.50	200.80
Rent for work equipment	329.00	865.99	341.00	3,653.38	180.00
Rent for leased roads	393,408.50	343,939.80	1,500.00	.....	110,850.00
Miscellaneous rents	146.00	151.00	106.00	141.00	199.68
Interest on funded debt	810,000.00	810,000.00	633,500.00	570,050.57	570,050.57
Interest on unfunded debt	36.41	933.82	824.27	896.37	1,913.11
Amortization of discount on funded debt	.....	.....	.....	13,706.47	13,706.47
Miscellaneous income charges	7,811.48	7,691.47	843.69	.....	.....
Total Deductions from Gross Income	$1,356,012.23	$1,325,368.01	$812,436.94	$793,852.62	$892,405.57
Net Income	$610,068.49	$391,772.92	$131,875.44	D $322,840.84	D $186.86

Cr—Credit. Dr—Debit. D—Deficit.
$—Combined report of Receiver and Corporation.
•—Includes $71,537.16 back mail pay applicable to period August 1, 1927 to December 31, 1928.

March 24, 1930.

[fol. 924] PLAINTIFFS' EXHIBIT NO. G

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 4555

Proposed Construction by DENVER & SALT LAKE WESTERN R. Co.

Submitted July 17, 1931. Decided September 15, 1931

Certificate issued authorizing the Denver & Salt Lake Western Railroad Company to construct a line of railroad in Eagle County, Colo. Previous report 154 I. C. C. 51.

Elmer L. Brock for applicant.

Winslow S. Pierce and Henry McAllister for Denver & Rio Grande Western Railroad Company.

Supplemental Report of the Commission

By the COMMISSION:

By report and order in the above-entitled proceeding dated April 15, 1929, 154 I. C. C. 51, we announced our finding that the public convenience and necessity required the construction by The Denver and Salt Lake Western Railroad Company of a line of railroad, known as the Dotsero cut-off, in Eagle County, Colo., upon condition that The Denver and Rio Grande Western Railroad Company be permitted to operate over said new line and over the Denver & Salt Lake Railway between Orestod and Utah Junction, Colo., on fair and reasonable terms. The applicant, hereinafter referred to as the Western, is a corporation organized under the laws of Wyoming for the purpose of engaging in interstate commerce. It is a subsidiary of The Denver and Salt Lake Railway Company, hereinafter called the Moffat, which owns all its capital stock. The Denver and Rio Grande Western will be referred to as the Rio Grande.

By our order of April 15, 1929, the record in this proceeding was held open for the filing by the Rio Grande, within 30 days, of the draft of a contract or agreement with the Western and/or the Moffat setting forth the terms and con-

ditions which the Rio Grande would be willing to accept as governing its operation over the proposed Dotsero cut-off and over the existing line of the Moffat east thereof. Our order also provided that, unless such contract be accepted by the Western and/or the Moffat, those carriers should file with us the draft of a contract setting forth the terms and conditions desired by them. On May 14, 1929, the required draft was filed by the Rio Grande. Not accepting the terms incorporated therein, the Moffat requested, and was granted, extensions of time for the filing of its draft, and, on February 19, 1931, such draft was finally received. In the meantime, the Rio Grande filed its application, recorded in Finance Docket No. 8070, for authority to acquire control of the Moffat by the purchase of capital stock. A finding was announced on December 2, 1930, Denver & S. L. Ry. Co. Control, 170 I. C. C. 4, that such acquisition of control would be in the public interest, but the entry of an order was made subject to the acceptance by the Rio Grande of certain specified conditions. Among these conditions was one requiring the Rio Grande, through the Moffat, to commence the construction of the Dotsero cut-off within six months from the date of the order to be entered. Since this involved the trackage contract connected with Finance [fol. 925] Docket No. 4555, the two proceedings became closely interdependent. Upon request of the Rio Grande, stating that an agreement between the carriers was in prospect, extensions of time were granted for the filing of acceptance of the conditions prescribed in Finance Docket No. 8070. On July 17, 1931, the acceptance was received. On the same date, there was filed an agreement executed, subject to our approval, by the Western, the Moffat, and the Rio Grande covering the construction of the cut-off and the proposed trackage operation of the Rio Grande over the Moffat line into Denver. We consider that our order of April 15, 1929, supra, was sufficiently broad to permit the filing of such final agreement, and that, with such filing, the tentative drafts heretofore submitted may be disregarded.

In our former report, we stated that the Western sought permission under section 15a (18) to retain the excess earnings of the cut-off. As will be explained, it is now intended that the cut-off shall be operated not by the Western but

by the Rio Grande. In so far as this application is concerned, the request for permission to retain excess earnings may, therefore, be ignored. The cost of construction was estimated by the applicant at $2,555,000 and by the Rio Grande at not less than $3,000,000. With a length of 41.3 miles between Dotsero on the Rio Grande and Orestod on the Moffat line, the cut-off will shorten the distance over the Rio Grande between Dotsero and Denver by 173 miles. The Moffat operates the railway portion of the tunnel owned by the Moffat Tunnel Improvement District under a 50-year lease, the validity of which lease has been sustained by the United States District Court and by the Court of Appeals for the Tenth Circuit. Our approval of the joint trackage agreement now submitted assumes the legality of the Moffat's right to permit the Rio Grande to operate through the tunnel, but our approval is not to be construed as a guaranty of such legality.

The trackage agreement bears the date of October 15, 1928, and its term is coextensive with that of the tunnel lease. Including 8.92 miles in the tunnel district, the length of joint line between Utah Junction and Orestod is fixed at 124.54 miles. The Moffat's old line through Corona is not included. The Moffat agrees to fulfill its obligations under the tunnel lease and will not enter into any modification or amendment thereof without the concurrence of the Rio Grande. As rental for the joint line, the Rio Grande will pay each month one-twelfth of $300,000, covering the property as of October 15, 1928, plus the monthly proportion of 5.5 per cent per annum upon the cost of additions and betterments made by the Moffat under the conditions specified, plus one-half of the tunnel rental after the cut-off shall have been completed ready for use, and plus one-half of the cost of additions and betterments made by the Moffat in the tunnel district. The Rio Grande further agrees to pay one-half of any other obligations, except for maintenance, operation, and insurance, assumed by the Moffat under the tunnel lease. Until the Rio Grande's operation and rental payments shall begin, that carrier will pay one-fourth of the tunnel rental and insurance from February 26, 1928, to the date of beginning operation, such period, however, not to exceed 18 months. From and after the date of completion of the cut-off, the Rio Grande will pay a proportion of the expense incurred by the Moffat for maintenance,

repair, renewal, and operation of the joint line on the basis of the relation of Rio Grande car-miles to the total car-miles on the line. This car-mile basis will apply in the event additional carriers are permitted to operate over the joint line, but a minimum payment of 50 per cent of the cost of maintenance is guaranteed by the Rio Grande, unless [fol. 926] the Moffat's car-mile proportion exceeds 75 per cent. Unit prices for work equipment are stated in detail, such prices representing a 24-hour day. It is agreed that all bills rendered for maintenance, renewals, operation, and improvements shall include a general charge of 10 per cent on labor cost, 5 per cent on materials, with certain exceptions, and 2 per cent on payments to contractors. Adjustment of these surcharges may be made, if necessary, after the first year of operation. Freight charges are to be added at the rate of 1 cent per ton-mile except where such rate would exceed the published tariff.

Provision is made for certain needed improvements on the joint line, namely, lengthening or constructing passing tracks, finishing two uncompleted tunnels or reconstructing the main line in order to reduce curvature at these points, installing heavier rail, placing ballast on unballasted portions of the joint line, and installing automatic block signals. The capital cost of these improvements is to be added to the value of the joint line from month to month as the expenditures are made, and the Rio Grande will pay rental on the same at the rate of one-half of 5.5 per cent per annum. Operating expenses incurred in connection with the work are to be divided on the car-mile basis, an adjustment being provided for work done prior to the completion of the cut-off. The Moffat is not obligated to expend more than $1,250,000 for these additions and betterments.

All general taxes and assessments on the joint line will be initially paid by the Moffat but will be borne in equal proportion by the parties after the date of completion of the cut-off. The Rio Grande will pay any taxes which shall be levied upon its gross or net earnings on the joint line or upon its equipment which moves over that line. The exclusive operating costs of either carrier are to be paid by it. Unless required by law or by a regulatory body having jurisdiction, the Rio Grande will not handle any traffic for its own account over the joint line which originates at or is destined to any point thereon, but not including Denver or

Orestod, or which originates at or beyond Denver and is destined to points beyond Orestod on the Moffat, such points not being on the line of the Rio Grande or its connections other than the Moffat. Traffic in the opposite direction to that just mentioned is likewise prohibited. The Moffat is, similarly, not allowed to handle traffic for its own account which originates at or beyond Denver and is to move over the Dotsero cut-off destined via, or to points, on the Rio Grande, or vice versa.

The Moffat will have exclusive control of the maintenance and operation of the joint line, but the trains of each party will be given equal dispatch according to the class of such trains. Each party shall have the right to have reasonably necessary improvements made on the joint line, the work to be done under the direction of the Moffat. If made on the tunnel section, the cost shall be shared equally; if elsewhere on the joint line the cost shall be added to the value upon which the rental is to be based, as has been explained. No single improvement involving an expense exceeding $15,000 shall be made by the Moffat, except with the concurrence of the Rio Grande or by the requirements of State or Federal law. The Rio Grande is accorded the right to build, at its own expense, an engine terminal at Tabernash or other convenient point, a connecting track at Utah Junction, and a telegraph line. Provision is made for adjustment of loss and damage claims, the settlements of suits, the handling of accounts in accordance with our regulations, and the adjustment of disputes by arbitration. It is stated in the contract that nothing therein is to be construed [fol. 927] as a warranty or assurance on the part of the Moffat respecting the tunnel lease. A copy of the lease, and a supplemental agreement thereto, accompanies the agreement submitted.

Along with the trackage contract described in outline above, the three companies filed a copy of an agreement dated June 22, 1931, covering the construction and operation of the Dotsero cut-off. This agreement provides that the Moffat would transfer to the Rio Grande all the issued and outstanding capital stock of the Western now held by the Moffat, such transfer to take place immediately upon the issue of our certificate in Finance Docket No. 4555, and our order in Finance Docket No. 8070. Coincident with such transfer, the Rio Grande would reimburse the Moffat

for all amounts, not exceeding $50,000 in the aggregate, expended by the Moffat for the account of the Western, and the Western would capitalize the amounts so paid by the issue of its capital stock to the Rio Grande. The Rio Grande agrees to cause the Western to proceed with all reasonable diligence with the construction of the Dotsero cut-off, and to complete it within two years. The undertaking of the work is, however, made contingent upon the issuance of our certificate herein and the transfer of the Western stock to the Rio Grande. The funds required for construction would be advanced by the Rio Grande in consideration of stock or mortgage bonds of the Western, as may be determined by the Rio Grande and as may be approved by us. Additions and betterments on the line are to be covered by mortgage bonds to be issued to the Rio Grande after such expenditures are made. The cut-off construction is understood to embrace a yard at or near Orestod, and any other facilities required.

The agreement provides that the Dotsero cut-off, when completed and ready for operation, shall be leased to the Rio Grande for a term coincident with the life of the trackage agreement covering the Moffat line between Orestod and Utah Junction. Comprising the rental payment are all taxes levied against the cut-off, interest on all bonds issued by the Western, any and all amounts which may be payable by the Western under the terms of any mortgages upon the cut-off that may be executed, including sinking-fund payments, if any, all charges which the Western may be obliged to pay to assure its separate corporate existence, and any dividends which may be declared and paid on the Western stock, not exceeding $6 per share per annum. This lease is subject to the issue of our certificate authorizing the construction of the cut-off, and our accompanying approval of the joint trackage agreement, as well as our future approval of the security issues connected with the initial construction. Provision is made for the Moffat to reacquire from the Rio Grande, at the true original cost thereof to that carrier, all the capital stock of the Western, in the event of a breach of the joint trackage agreement by the Rio Grande, or a breach of any of the provisions of this agreement covering the cut-off, or a default in the Rio Grande's performance of the lease agreement which would entitle the Western to cancel such agreement after 60 days'

notice given to the Rio Grande. The Rio Grande will accept all the conditions imposed by us in Finance Docket No. 8070, including the time of beginning and completing the construction of the cut-off, but it will request an amendment of our condition (3) wherein the Moffat was named as the intermediary company through which the work was to be carried on. According to the present plan of stock ownership of the Western and a lease of its properties to the Rio Grande, the Western instead of the Moffat would be the appropriate medium for the construction.

[fol. 928] As stated in our former report, we are aware that the Rio Grande desired to lease the Dotsero cut-off if the general plan of operation into Denver were followed. Accompanying the tentative trackage contracts filed respectively by the Rio Grande and the Moffat in accordance with our order, were drafts of a proposed lease agreement covering the cut-off. These differ from the agreement now filed, and which has just been discussed, in that $1,000,000 of common capital stock of the Western was then proposed to be issued in equal parts to the Rio Grande and the Moffat, and the remainder of the cost of construction was to be financed by an issue of first-mortgage 5.5 per cent bonds, which were to be purchased by the Rio Grande at par and accrued interest. The present plan contemplates complete stock ownership of the Western by the Rio Grande at the outset, the entire amount of money for construction being furnished by the carrier and covered by either a stock or a bond issue of the Western, as may be decided later.

The Rio Grande's proposal to operate over the Dotsero cut-off conforms to the finding of public convenience and necessity announced in our original report, and we understand and assume that an appropriate application will be filed to cover such operation and the proposed operation over the Moffat line. Authority under section 20a will be necessary for the issue of securities by the Western.

Upon the facts presented we find that the present and future public convenience and necessity require the construction by The Denver and Salt Lake Western Railroad Company of the line of railroad in Eagle County, Colo., described in the application.

An appropriate certificate and supplemental order will be issued.

Chairman Brainerd and Commissioners Eastman and Tate did not participate in the disposition of this case.

[fols. 929-968] At a General Session of the INTERSTATE COMMERCE COMMISSION, Held at Its Office, in Washington, D. C., on the 15th Day of September, A. D. 1931

Finance Docket No. 4555

Proposed Construction by DENVER & SALT LAKE WESTERN R. CO.

Certificate and Supplemental Order

Further consideration of the matters and things involved in this proceeding having been had, and said division having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is hereby certified, That the present and future public convenience and necessity require the construction by The Denver and Salt Lake Western Railroad Company of a line of railroad in Eagle County, Colo., described in the application and reports aforesaid: Provided, however, and this certificate is issued upon the express condition, that the construction of said line shall be commenced at or before the expiration of six months from the date hereof, and shall be completed within two years after such commencement.

It is ordered, That The Denver and Salt Lake Western Railroad Company shall report to this commission, in writing, the commencement and completion of the construction herein authorized within 15 days after such commencement and completion, respectively.

It is further ordered, That The Denver and Salt Lake Western Railroad Company shall report to this commission as required by valuation order No. 24, effective May 15, 1928.

And it is further ordered, That this certificate and order shall take effect and be in force from and after 30 days from its date.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 969] IN SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME—Filed Sept. 30, 1932

And now, to-wit, this twenty-ninth day of September, A. D. 1932, upon motion of John J. Morris, Jr., Esq., solicitor for plaintiffs-appellants,

It is ordered by the court that the return day of the citation issued on appeal of appellants in the above entitled cause be and hereby is extended to and including the twenty-ninth day of October, A. D. 1932.

John P. Nields, J.

[fol. 970] [File endorsement omitted.]

[fols. 971 & 972] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS APPELLANTS RELY ON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed Dec. 7, 1932

Come now the above named appellants and specify the following as the points upon which they will rely upon this appeal in the above entitled cause; appellants contend:

I

That the interest which these appellants have in the matters which were in issue in the proceedings before the Interstate Commerce Commission, out of which proceedings this suit arose, and the injury to these appellants resulting from the order of said Commission in such proceedings, are sufficient to permit these appellants to institute and maintain this suit.

II

That the fact that appellants are voluntary unincorporated associations does not debar them from instituting and maintaining this suit.

[fol. 973]

III

That the Interstate Commerce Commission, in the proceedings out of which this suit arose, because of the exclusion of testimony which was offered before it, did not hold a full and fair hearing as to whether the acquisition of control of The Denver and Salt Lake Railway Company

by The Denver and Rio Grande Railroad Company was in the public interest.

IV

That these appellants can complain of the exclusion of testimony by the Interstate Commerce Commission in the proceedings above referred to even though part of the testimony so excluded was offered by parties other than the appellants.

Albert L. Vogl, Solicitor for Appellants.

Appellants further specify that the following parts of the record in this case are material to the consideration of the above enumerated points:

1. The Bill of Complaint—but not the exhibits attached thereto, except as specified below.

2. Exhibit A—Map attached to the Complaint.

3. Exhibit B, attached to Complaint, being Interstate Commerce Commission's order of September 15, 1931, in Finance Docket No. 8070.

[fol. 974] 4. Exhibit C attached to Complaint, being the opinion of the Interstate Commerce Commission in Finance Docket No. 8070 (170 I. C. C. 4).

5. Answer of Interstate Commerce Commission.

6. Motion to dismiss filed by defendant The Denver and Rio Grande Western Railroad Company.

7. Answer of United States of America.

8. Plaintiff's motion for preliminary examination.

9. Agreed Narrative Statement of evidence before the Interstate Commerce Commission and stipulation approving same.

10. The following portions only of Exhibit F, introduced in the District Court at Wilmington:

(a) Pages 1 to 9 of the Application of The Denver and Rio Grande Western Railroad Company before the Interstate Commerce Commission.

(b) Exhibit 4, introduced before the Interstate Commerce Commission by Witness Williams, being three pages of Income Statement of The Denver and Salt Lake Railway Company.

(c) Exhibit 1, introduced before the Interstate Commerce Commission, being a copy of the opinion of the said Commission in Finance Docket 4555, Proposed Construction by The Denver and Salt Lake Western Railway.

(d) Certificate of the Commission that (a), (b), and (c), were a part of the record before it—or a memorandum to that effect.

[fols. 975 & 976] 11. Opinion of the Lower Court.

12. Final Decree.

13. Petition for Appeal.

14. Assignments of Error.

15. Order allowing appeal.

Albert L. Vogl, Solicitor for Appellants.

We hereby acknowledge receipt of a copy of the above and foregoing specification of points appellants rely on and specification of parts of record to be printed upon the date set after our respective signatures.

Thomas D. Thacher (A. I.), Solicitor General; Leonard E. Wales, Counsel for United States of America. Date: Dec. 5, 1932. Nelson Thomas, Counsel for Interstate Commerce Commission, Dec. 8, 1932. C. A. Southerland, Henry McAllister, Counsel for Denver and Rio Grande Western Railroad Company, December 2, 1932. Dudley C. ——, Dec. 5, 1932; Elmer L. Brock, December 2, 1932, Counsel for Denver and Salt Lake Railway Company. Howard Duane, Dec. 5th, 1932; Norton Montgomery, December 2, 1932, Counsel for the Moffat Tunnel Improvement District and Herbert C. Fairall et al., as Members of the Moffat Tunnel Commission. Howard Duane, Dec. 5th, 1932; Colin A. Smith, December 2, 1932, Counsel for the State of Colorado ex Rel. the Public Utilities Commission of the State of Colorado and Worth Allen et al., as Members of said Commission.

[fol. 977] [File endorsement omitted.]

[fol. 978] In Supreme Court of the United States

Appellees' Designation of Additional Parts of the Record for Printing—Filed Dec. 8, 1932

Come now the above named appellees and The Denver and Salt Lake Railway Company, The Moffat Tunnel Im-

provement District and Herbert C. Fairall et al., as members of The Moffat Tunnel Commission, and the State of Colorado ex rel. The Public Utilities Commission of the State of Colorado and Worth Allen et al., as members of said Commission, intervenor-defendants, and designate (for printing) the following parts of the record, which they think are material to the points on which appellants intend to rely as specified in their "Specification of Points Appellants rely on and Specification of Parts of the Record to be Printed" heretofore served on the undersigned, in addition to the parts of the record therein designated by Appellants:

[fol. 979 & 980] 1. The Docket entries of the District Court, as contained in the record;

2. The answer of The Denver and Salt Lake Railway Company, intervenor-defendant;

3. The answer of The Denver and Rio Grande Western Railroad Company;

4. The answer of The Moffat Tunnel Improvement District and Herbert C. Fairall et al., as members of the Moffat Tunnel Commission, intervenor-defendants;

5. The answer of the State of Colorado ex rel. The Public Utilities Commission of the State of Colorado and Worth Allen et al., as members of said Commission, intervenor-defendants.

6. Exhibit G, as introduced in evidence by the plaintiffs (appellants) at the hearing in the District Court, the same being copy of a report and order of Interstate Commerce Commission in its Finance Docket No. 4555.

Thomas D. Thacher (A. I.), Solicitor General; Elmer B. Collins, Solicitor- for United States of America. Nelson Thomas, Solicitor for Interstate Commerce Commission. Henry McAllister, Solicitor for The Denver and Rio Grande Western Railroad Company. Elmer L. Brock, Solicitor for The Denver and Salt Lake Railway Company. Norton Montgomery, Solicitor for Moffat Tunnel Improvement District and Moffat Tunnel Commission. Colin A. Smith, Solicitor for the State of Colorado ex rel. Public Utilities Commission, etc.

[fol. 981] [File endorsement omitted.]

Endorsed on cover: File No. 37,196. Delaware D. C. U. S. Term No. 499. The Moffat Tunnel League and Uintah Basin Railroad League, appellants, vs. The United States of America, Interstate Commerce Commission, The Denver and Rio Grande Western Railroad Company et al. Filed November 5, 1932. File No. 37,196.

FILE COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 499.

THE MOFFAT TUNNEL LEAGUE

and

UINTAH BASIN RAILROAD LEAGUE, VOLUNTARY ASSOCIATIONS,
Appellants,

vs.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
A Corporation, *Appellees.*

STATEMENT AS TO JURISDICTION ON APPEAL.

ALBERT L. VOGL,
Denver, Colo.,
Solicitor for Appellants.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

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THE MOFFAT TUNNEL LEAGUE

and

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Appellants,

vs.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
A Corporation, *Appellees.*

STATEMENT AS TO JURISDICTION ON APPEAL.

The appellants respectfully present the following statement of the grounds upon which it is claimed this Court has jurisdiction to review this case on appeal.

I.

STATEMENT OF THE CASE.

This is an appeal from a decree of the District Court of the United States for the District of Delaware—a three

judge Court constituted as provided by 28 U. S. C. A. Section 47. The opinion of the lower court is reported in 59 Fed. Rep. 2nd 760. The plaintiffs, who are the appellants here and will be hereafter referred to as plaintiffs, filed their bill to enjoin and set aside an order of the Interstate Commerce Commission purporting to authorize The Denver and Rio Grande Western Railroad Company to acquire control, by stock purchase, of The Denver and Salt Lake Railway Company.

The suit was filed against the United States of America, Interstate Commerce Commission, and The Denver and Rio Grande Western Railroad Company. The Denver and Salt Lake Railway Company and other interested parties intervened.

Motions to dismiss the petition based upon a challenge of the right of the plaintiffs to institute and maintain the suit were filed by defendants and answers upon the merits were also filed by the defendants and interveners. The case was heard in the lower court upon plaintiffs' application for a temporary injunction and upon the motions to dismiss.

On stipulation of counsel, it was agreed that the record which would be presented upon a final hearing would be the same as that presented on the application for temporary injunction and motion to dismiss and that, therefore, final decision could be entered upon the record as so made.

The Court granted the motions to dismiss, and also "to make the judgment complete, the prayer of the petition for a preliminary injunction, is, after full hearing, denied, and the prayer for a permanent injunction (on a stipulation of counsel that the case on the hearing should stand submitted for final decision), is denied". 59 Fed. Rep. 2nd 760 (766).

The circumstances out of which this cases arises are as follows:

February 1, 1930, The Denver and Rio Grande Western Railroad Company—hereinafter referred to as the Rio

Grande—filed an application with the Interstate Commerce Commission—hereinafter referred to as the Commission—under Sec. 5, Par. 2 of The Interstate Commerce Act (U. S. C. A. Tit. 49, Sec. 5, Par. 2) for an order authorizing the Rio Grande to acquire, by stock purchase, control of The Denver and Salt Lake Railway Company, hereinafter referred to as the Moffat Road. Plaintiffs were granted leave to intervene and thereafter participated in all hearings before the Commission.

Plaintiff The Moffat Tunnel League represents communities, property owners, and residents in Western Colorado, all within the territory included in "The Moffat Tunnel Improvement District", all real estate within which District is subject to the lien of the Moffat Tunnel bonds. The legality of those bonds was sustained by this Court in Milheim vs. Moffat Tunnel Improvement District, 262 U. S. 710 (67 Law. Ed. 1194). The plaintiff Uintah Basin Railroad League represents similar interests in Eastern Utah (outside of the Moffat Tunnel Improvement District) in the territory which would be served by the Moffat Road if it were extended to Salt Lake; plaintiffs claim that one of the purposes of the public construction of the Moffat Tunnel was to insure the construction of this extension to Salt Lake City, and that one of the purposes of the Rio Grande in the acquisition of control of the Moffat Road is to prevent that extension.

The application was granted by the Commission September 15, 1931, (Denver and Salt Lake Railway Company Control,175 I. C. C. Rep. 542). Thereupon plaintiffs filed this suit in the District Court of the United States for the District of Delaware (the Rio Grande being a Delaware corporation) to enjoin and set aside the order of the Commission.

The grounds upon which plaintiffs sought to set aside the order of the Commission were that the Commission did not hold a "hearing" as required by law, on the question of whether the acquisition of control prayed for by the

Rio Grande "will be in the public interest", because at the hearings held by the Commission, the Commission refused to receive and refused to consider material and relevant evidence offered by plaintiffs and others, concerning the effect upon "public interest" which such acquisition would have.

II.

STATUTORY PROVISIONS.

The suit was instituted in the Federal Court under Par. 28 of Sec. 41 of Title 28, U. S. C. A., giving the Federal District Courts original jurisdiction of "cases brought to enjoin, set aside, annul or suspend * * * any order of the Interstate Commerce Commission".

The hearing was before a three judge court as provided by Sec. 47 of Title 28, U. S. C. A.

The appeal was taken to this Court under the provisions of the same Section 47, which provides:

> "An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. (Oct. 22, 1913, c. 32, 38 Stat. 220.)"

And also Section 47a, Title 28 U. S. C. A. (Judicial Code Section 210), which provides:

> "A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such

> final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. * * * The Supreme Court may affirm, reverse, or modify as the case may require the final judgment or decree of the district court in the cases specified in section 44 of this title."

Section 44 referred to includes suits to set aside orders of the Interstate Commerce Commission.

III.

DECREE AND PETITION FOR APPEAL.

The Decree was entered in the District Court, July 7th, 1932.

Petition for Appeal was filed July 18th, 1932, and allowed by the District Court July 18th, 1932.

IV.

QUESTIONS INVOLVED.

Four points were decided by the District Court which were as follows:

A. That the plaintiff cannot institute this suit because they do not have a legal interest in the Commission's order and cannot sustain a legal injury by reason of it.

B. That the plaintiffs cannot maintain this suit because they are voluntary unincorporated associations.

C. That the Commission did not improperly exclude evidence offered by the plaintiffs.

D. That some of the evidence excluded by the Commission was offered by parties other than plaintiffs, and that even if such exclusion was improper plaintiffs cannot complain because that evidence was offered by parties other than the plaintiffs.

V.

AUTHORITIES SUSTAINING JURISDICTION.

A permissive order of the Commission permitting a carrier to do something otherwise prohibited, is subject to judicial review.

> Baltimore and Ohio Railroad Co. vs. United States, 264 U. S. 258 (263), 68 Law. Ed. 667 (673).

A direct appeal lies to this Court under Section 47, U. S. C. A. Title 28, and Section 47a, Title 28, U. S. C. A., being Section 210 of the Judicial Code, from a dismissal of a suit to enjoin or set aside an order of the Interstate Commerce Commission after hearing, by a three judge court, under said Section 47, on plaintiffs' motion for temporary injunction and defendants' motion to dismiss, where parties agree that final order may be entered upon such hearing.

> Baltimore and Ohio R. R. Co. vs. United States, *supra.*
> Louisville & N. R. R. Co. vs. United States, 242 U. S. 60 (61 L. Ed. 152).
> Transit Commission vs. United States, 284 U. S. 360 (76 Law. Ed. 342).
> State of Colorado vs. United States, 271 U. S. 153 (70 Law. Ed. 378).
> Claiborne-Annapolis Ferry Co. vs. United States, 285 U. S. 382 (76 Law. Ed. 808).

The question whether the plaintiffs have such a legal interest in the order of the Commission as will permit them to maintain this suit or whether they will suffer a legal injury by such order, will be determined by this Court on appeal.

> Western Pac. Cal. R. Co. vs. Southern Pac. Co., 284 U. S. 47 (76 Law. Ed. 160).
> Claiborne-Annapolis Ferry Co. vs. United States, 285 U. S. 382 (390), 76 Law. Ed. 808 (814).
> Baltimore and Ohio R. R. Co. vs. United States, 264 U. S. 258 (266-8), 68 Law. Ed. 667 (674-5).

The statute requires a full and fair hearing before the Commission in a case of the nature of that here involved; this Court will review the proceedings before the Commission to determine whether there was such a hearing.

Baltimore and Ohio R. R. Co. vs. United States, 264 U. S. 258 (265), 68 Law. Ed. 667 (674).
United States vs. Abilene & S. R. Co., 265 U. S. 274 (288-9), 68 Law. Ed. 1017 (1023).
Colorado vs. United States, 271 U. S. 153, (168-9), 70 Law. Ed. 878 (885-6).
Claiborne-Annapolis Ferry Co. vs. United States, 285 U. S. 382 (392), 76 Law. Ed. 808 (815).
Georgia Public Service Com. vs. United States, 283 U. S. 765 (769-770), 75 Law. Ed. 1397 (1402-3).

Respectfully submitted,

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Denver, Colo.,
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Supreme Court of the United States

OCTOBER TERM, 1932.

No. 499

THE MOFFAT TUNNEL LEAGUE AND UINTAH BASIN RAILROAD LEAGUE, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, *et al.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE.

BRIEF ON BEHALF OF APPELLANTS.

A. REFERENCE TO OPINIONS OF THE LOWER COURT AND DECISIONS OF THE COMMISSION.

This appeal is taken from the decision of the United States District Court for the District of Delaware (three Judge Court). The case is reported:

Moffat Tunnel League, *et al.*, v. United States, *et al.*, 59 Fed. Rep. 2nd 760.

The decisions and orders of the Interstate Commerce Commission involved are reported as follows:

Denver and Salt Lake Railway Company Control (Finance Docket No. 8070), 170 I. C. C. 4 (Opinion).
Same Case 175 I. C. C. 542 (Order).

The Dotsero Cut-Off Case is reported:

Construction by Denver & Salt Lake Western Railroad Company (Finance Docket No. 4555).
154 I. C. C. 51 (Opinion).

Same Case 175 I. C. C. 535 (Order).

After this suit was instituted an order was entered in both Dockets 4555 and 8070 extending the time within which the Rio Grande should comply with the conditions of the Commission's orders, until June 15, 1932 (180 I. C. C. 715), and the time was again extended until September 15, 1932, by Order entered June 14, 1932 (184 I. C. C. 721).

B. STATEMENT OF THE CASE.

1. History of the Litigation.

February 1, 1930, The Denver and Rio Grande Western Railroad Company—hereinafter referred to as the Rio Grande—filed an application with the Interstate Commerce Commission—hereinafter referred to as the Commission—under Sec. 5, Par. 2 of The Interstate Commerce Act (U. S. C. A. Tit. 49, Sec. 5, Par. 2) for an order authorizing the Rio Grande to acquire control of The Denver and Salt Lake Railway Company—hereinafter referred to as the Moffat Road—by stock purchase.

On petition, appellants were each granted leave to intervene in the proceedings before the Commission and thereafter very actively participated in all hearings before the Commission (Ex. C, R. 17, R. 62).

On September 15, 1931, the Commission granted the application of the Rio Grande to acquire control of the Moffat Road (Denver and Salt Lake Railway Company Control, 175 I. C. C. Rep. 542) (Ex. B, R. 13).

Thereupon appellants filed this suit in the District Court of the United States for the District of Delaware (the Rio Grande being a Delaware corporation) to enjoin and set aside the order of the Commission.

The grounds upon which appellants sought to set aside the order of the Commission were that the Commission did

not hold a "hearing" as required by law, on the question of whether the acquisition of control prayed for by the Rio Grande "will be in the public interest", because at the hearings held by the Commission, the Commission refused to receive and refused to consider material and relevant evidence offered by appellants and others, concerning the effect upon "public interest" which such acquisition would have (R., p. 6—VI).

Motions to dismiss the petition based upon a challenge of the right of the plaintiffs to institute and maintain the suit were filed by defendants and interveners and answers upon the merits were also filed by the defendants and interveners. The case was heard in the lower court upon plaintiffs' application for a temporary injunction and upon the motions to dismiss.

On oral stipulation of counsel, it was agreed that the record which would be presented upon a final hearing would be the same as that presented on the application for temporary injunction and motions to dismiss, and that, therefore, final decision could be entered upon the record as so made (R. 131).

The Court granted the motions to dismiss, and also "to make the judgment complete, the prayer of the petition for a preliminary injunction, is, after full hearing, denied, and the prayer for a permanent injunction (on a stipulation of counsel that the case on the hearing should stand submitted for final decision), is denied" 59 Fed. Rep. 2nd 760 (766) (R. 131).

2. IDENTITY OF APPELLANTS.

Appellant The Moffat Tunnel League is an unincorporated association. Its nine members are selected, three by each of the respective Boards of County Commissioners for the three counties represented by the League, the selections being made from persons designated therefor by the commercial and service clubs in the three counties. The three counties represented are Grand, Routt, and Moffat, each located in the Moffat Tunnel Improvement District (R. 88-89). All real estate within this improvement district, therefore all real

estate in the three counties mentioned above, is subject to the lien of the Moffat Tunnel bonds—the purpose of creating this district and the legality of the bonds is fully discussed in the opinion of this Court in Milheim v. Moffat Tunnel Improvement District, 262 U. S. 710 (67 Law. Ed. 1194). The County Commissioners requested this League to represent them, and the counties, in the matter of the proceedings incident to the Rio Grande's application (R. 89).

Appellant Uintah Basin Railroad League is also a voluntary unincorporated organization of the Boards of County Commissioners of Uintah and Duchesne Counties, Utah, and of the commercial and service clubs in those counties, and was organized to secure railroad facilities for those counties (R. 109). The Moffat Tunnel Improvement District does not extend into Utah (Ex. A, R. 12a). The Moffat Road, if extended west to Provo or Salt Lake City, Utah, would serve Uintah and Duchesne Counties (Ex. A, R. 12A). Appellants claim that one of the purposes of the public construction of the Moffat Tunnel was to insure the construction of the Moffat Road to Salt Lake City, and that one of the purposes of the Rio Grande in the acquisition of control of the Moffat Road is to prevent that extension.

3. THE MOFFAT ROAD AND THE MOFFAT TUNNEL.

The Moffat Road extends westerly from Utah Junction (Denver) to Craig, Colorado, 232 miles (R. 20). David Moffat, a Denver pioneer, organized the Moffat Road Company to build a railroad between Denver and Salt Lake City, and built as far as Craig and there stopped. Operations were too unprofitable, because of expensive operating conditions and light business, to encourage the building of the road westward, so in 1919 the Colorado Legislature passed a law (Chap. 195, Colo. Laws 1919, p. 669) to create a commission, with powers to acquire the Moffat Road for the State, build the Moffat Tunnel, and the Dotsero Cut-Off, and to extend the Moffat Road from Craig to the western boundary of Colorado. This law was repealed in 1921, and the next year the Colorado Legislature in special session enacted the Moffat Tunnel Law, creating the Moffat Tunnel District and the Moffat Tunnel Commission, with powers to construct the

Moffat Tunnel and to raise money for that purpose by issuing bonds of the District, which bonds are a lien against all real estate in the district (R. 122-3). The par value of these bonds is $15,470,000.00 (R. 78). The District holds title to the Tunnel and approximately ten miles of railroad line, including about six miles in the Tunnel (Ex. C, R. 20). The general balance sheet of the Moffat Road as of October 31, 1929, showed investment in Road and Equipment, $16,515,-633.88 (Ex. C, R. 21).

4. THE RIO GRANDE ROAD.

The Rio Grande extends from Denver to Salt Lake City and Ogden, Utah. From Denver it goes south 119 miles to Pueblo, thence northwesterly, crossing the Continental Divide at Tennessee Pass, at an altitude of 11,000 feet, to Salt Lake City (R. 122). The two roads are somewhat parallel at irregular distances apart, approaching within 41 miles at the point of the proposed Dotsero Cut-Off (R. 123).

5. OPPOSITION OF THE RIO GRANDE TO A WESTERN EXTENSION OF THE MOFFAT ROAD.

Julian M. Bamberger testified that in the Commission's Finance Docket 4713, The Salt Lake and Denver Railroad Company petitioned for authority to construct a line from Provo, Utah, to Craig, Colorado.

> "* * the Rio Grande not only displayed a serious and severe antagonism to our application but in many ways has endeavored to make it difficult for us to proceed with our plans" (R. 103).

The territory referred to as the Uintah Basin is approximately one hundred miles north and south and three hundred miles east and west, bounded on the north by the Uintah Mountains, on the south by the Book Cliff Range, and includes eastern Utah and western Colorado (R. 106). The only railroads in this basin are the Moffat Road, which enters the basin from the east and extends as far as Craig, Colorado, and a narrow gauge line which extends from Mack, Colorado, a point on the Rio Grande, to Watson, Utah—which road was constructed, and is used almost exclusively, for

transporting Gilsonite. Only twenty miles of this road is in Utah (R. 106).

In the brief filed by the Rio Grande in Finance Docket 4713 it was stated,

> "It is evident that the people living in the Uintah Basin, whether in or around the so called Vernal Country, or in the western Moffat County, Colorado, if the limits of the Basin be extended to include that area, would be benefited by the construction of applicant's railroad. *That they need further transportation facilities is undoubted.* That the business which they, or their sections, would contribute to this proposed railroad would justify the enormous expenditure involved, is another and far different question, which we are satisfied must be answered in the negative" (R. 109-110). (Italics ours.)
>
> "That such construction would not only greatly impair the ability of the Denver and Rio Grande Western Railroad adequately to serve the public, but would add another weak, struggling and impecunious unit to the railroad map of the Rocky Mountain section of the country, is, we believe, manifest from a candid and conservative review of the record in this case" (R. 113).
>
> "The Denver and Rio Grande Western Railroad Company realizes that its interests cannot be allowed to stand in the way of a necessary and economically sound railroad enterprise, which will not depend for its possible financial success upon the ruin of established systems of transportation, the prevention of their improvement and damage to communities and industries which have arisen along their course, and which they serve. But the record in this case, both by direct statement of applicant's witnesses, and by necessary inference from the facts, shows that applicant proposes to live upon the traffic it takes from the Denver. Without it the Bamberger line would not exist even on paper, and the application would not have been presented. Even including this traffic, a fair review of the evi-

dence and revision of the estimate respecting the cost of the projected railroad and its probable earnings must lead to the conclusion that it will not be self-sustaining, that it must fail financially, and that with such failure it will at least impair the ability of the Denver to fulfill its obligations to the public" (R. 113-4).

Witness B. H. Taylor, Vice President of the Rio Grande, testified that if the Moffat Road were extended from Craig, Colorado, to Provo, Utah, it would not be a competitor of the Rio Grande.

> "I don't think it would create any competition. I think we would be out" (R. 119).

6. THE DOTSERO CUT-OFF.

In December, 1924, the Denver and Salt Lake Western Railroad, a subsidiary of the Moffat Road, made application to the Commission, under Paragraph 18 of Section 1 of the Interstate Commerce Act, for authority to build a short line of railroad—41.3 miles—from Orestod to Dotsero, to connect the Moffat Road with the Rio Grande—this proposed short line is known as The Dotsero Cut-Off and will be hereafter referred to as the Cut-Off. Although the application was filed in 1924, the hearing on it was postponed at the request of the applicant until September, 1928, which was after the completion of the Moffat Tunnel (the first train through the Tunnel was February 14, 1928). These appellants did not participate in the hearings on the Cut-Off (Ex. 1, R. 143-4). Witness Edward C. Johnson (now Governor of the State of Colorado), then appearing as a witness for the Moffat Tunnel League, testified that the League was in favor of building the Cut-Off "if constructed by the right people" (R. 94-95). Counsel for the Rio Grande asked counsel for appellants to state the position of appellants relative to the building of the Cut-Off, in response to which appellants' counsel stated that they would be opposed to the Cut-Off if its construction would prevent the building of a western extension to the Moffat Road, but that "if the Moffat Road builds it, they will also build westward where there is tonnage" (R. 95). Witness Johnson further stated: We have no objection to the Cut-Off being

built by the Moffat Road; if the Moffat Road builds the Cut-Off then the Cut-Off does not become a competitive line with the extension west of Craig. If it is built by the applicant (the Rio Grande) the Cut-Off is immediately a competitive line with the proposed extension. I say that because if the Moffat Road owned the Cut-Off they couldn't compete with themselves. Therefore, the extension from Craig to Salt Lake would not be competitive with the Cut-Off because the Moffat Road could not compete with itself (R. 97).

April 15, 1929, the Commission entered its first opinion on the Application of the Moffat Road for authority to build the Cut-Off, in which it said, "Any proposal which would tend to produce an injurious effect upon the interests of that property" (the property of the Rio Grande) "should be considered very carefully" (Ex. 1, R. 147). The Commission then found that public convenience and necessity required the construction of the Cut-Off "upon condition that the Rio Grande be permitted to operate over said line" (the Cut-Off) "*and over the Moffat Road* between Orestod and Utah Junction, Colorado, on fair and reasonable terms to be approved by us" (Ex. 1, R. 149). (Emphasis ours.) *In less than one year from the date of this order, to-wit, February 1, 1930,* the Rio Grande was able to advise the Commission that "an opportunity was afforded to purchase" 21,334 shares of the Moffat Road (out of a total of 50,000 shares) and to make an agreement for the purchase of 7,635 additional shares, or a total of 28,969 shares, 57.9% of the total stock (Ex. C, R. 20).

7. MILEAGES BETWEEN MATERIAL POINTS.

The distances between Denver and Salt Lake City are as follows:

Via the Rio Grande	745	miles
" " Moffat Road—the Cut-Off and the Rio Grande	*572	"
" " Moffat Road and the proposed extension beyond Craig	575	"

*(This route also is more favorable as to grades than the route via the Rio Grande).

Via the Union Pacific	614 miles

Other distances which may be of interest to the Court:

Denver to East Portal of the Moffat Tunnel	50 miles
" " Orestod	129 "
" " Dotsero via the Moffat Road	170 "
" " " " " Rio Grande	343 "
" " Craig via the Moffat Road	234 "
Craig to Provo, Utah, via proposed Moffat road extension	297 "

8. MOFFAT ROAD INCOME BEFORE AND AFTER TUNNEL OPERATION.

In 1927, the last year of operation of the Moffat Road before the Tunnel was completed, the Moffat Road's net income was a deficit of $131,875.00, and in 1929, the net income (after paying the tunnel rentals) was a surplus of $610,068.00 (R. 153).

9. TUNNEL BOND ASSESSMENT AGAINST THE DISTRICT.

The Moffat Tunnel Commission levied two assessments of $516,000.00 each against the real estate in the District, one in each of the years 1928-1929 (Ex. C, R. 23); the tunnel rentals paid by the Moffat Road will equal only forty-nine to fifty per cent of the interest and principal of the Tunnel Bonds (Ex. C, R. 23, R. 79). The basis for the assessments is the value of each piece of real estate, using the County Assessor's valuations. If the values are changed by the Assessor from year to year the assessment for the tunnel bonds would correspondingly change (R. 80). No part of the Rio Grande road is within the Tunnel District except its lines within the City and County of Denver (R. 80).

Moffat County has an area of 3,000,000 acres, and the Moffat Road extends only seven miles into the County, but the entire County is subject to the lien of the Tunnel Bonds (R. 91). The Commission's Examiner would not permit the witness to testify as to the distance from Craig to the western boundary of the County (R. 91).

10. NATURE OF TESTIMONY EXCLUDED.

(1) That the construction of the Moffat Road has from the beginning included a plan under frequent public and railroad discussion for a western extension of the Moffat Road from Craig; that the construction of the Moffat Tunnel was in aid of this project as well as the Denver-Craig traffic and the Dotsero Cut-Off (R. 81).

(2) That in the assessment of benefits in the Moffat Tunnel District there was from the beginning included in such benefits the likelihood of a connection west from Craig, and that benefits were assessed by the Tunnel Commission on the basis of evidence of benefits which would result to the lands in the Moffat Tunnel Improvement District from railroads operating through the Tunnel over the three routes, namely, the Dotsero Cut-Off, the Denver-Craig line, and Denver to Utah via a western extension of the Moffat Road (R. 81).

(3) That the organization of the Moffat Tunnel District and the construction of the Moffat Tunnel were based on a long series of public activities and public campaigns, and as a means of facilitating successful operation of the Moffat Road not only as a local road but also as a through route which it was expected would be made with Utah common points and other points west of Craig by an extension of the Moffat Road (R. 81-100).

(4) That the construction of the Moffat Tunnel has been a matter of public importance to the State of Colorado since 1912; that during that time several projects were put forward and votes taken, both by the Legislature and the people, and that in each instance the people in the territory included in the Moffat Tunnel District voted for the construction, and the people in the territory which would be benefited by the acquiring of the Moffat Road by the Rio Grande consistently voted against it (R. 92).

(5) That the public interest, convenience and necessity require the construction of an extension from Craig; that from the time construction of the Moffat Road com-

menced, and throughout the period since such commencement, the public has been asked to assist it in one way or another, including the passage of the Tunnel Act, it was consistently held out that the purpose was to construct the road westward, and that the public would not have agreed to tax themselves if that hope had not been held out (R. 93-94).

(6) The available resources of the Uintah Basin, including Duchesne, Uintah, Grand, Routt, and Moffat Counties, for the purpose of showing the public interest in having a railroad construction west from Craig to either Provo or Salt Lake City (R. 111-116, 93).

(7) That many hundreds of settlers were induced to go into the Uintah Basin by reason of prospects held out to them by the Moffat Road, Government agents and commercial bodies, of the imminent probability of the extension of the Moffat Road through the Basin; that they have since left and stated as their reason the present lack of railroad facilities (R. 111-2).

(8) That the Moffat Road conducted a long campaign of colonization, and held out to the public and possible settlers, that its purpose and intent were to extend the line to either Provo or Salt Lake City, and that witness Paul, under instructions of the Vice President of the road, published half-page advertisements, holding out that inducement (R. 112).

(9) That the Unted States Government, by posters in post-offices and other public buildings, held out similar inducements to the public to colonize this section by advising them of the probability of the extension of the railroad (R. 112-3).

(10) All evidence, except that of the Rio Grande, relative to the construction of the Dotsero Cut-off, the public interest therein, and the financing thereof (R. 62-63, 74, 101).

(11) Evidence that the control of the Moffat Road by the Rio Grande would enable the latter to divert traffic

from the former and thereby financially wreck the former (R. 91-2).

(12) Evidence that the coal, which constitutes one of the principal items of traffic of the Moffat Road, is competitive with the coal which constitutes an important item of traffic of the Rio Grande, and that if the Rio Grande is permitted to obtain control of the Moffat Road it could use such control to destroy the Moffat Road's coal traffic for the benefit of the Rio Grande coal traffic (R. 90).

(13) Evidence that the Rio Grande has at all times been opposed to the extension of the Moffat Road westward beyond Craig (R. 100).

11. COMMISSION'S FINDINGS AS TO PUBLIC INTERESTS.

The Commission found that the granting of the Rio Grande's application was in the public interest for the following reasons:

A. Because it accords with the Commission's general plan of consolidation (Ex. C, R. 33).

B. It tends toward simplification of the construction and operation of the Cut-off (Ex. C, R. 33).

12. DISSENTING OPINION.

Commissioner Eastman filed a dissenting opinion because

> "In my judgment, it has not been shown that acquisition of control * * * is in the public interest" (Ex. C, R. 34).

C. ASSIGNMENTS OF ERROR URGED.

Appellants urge the following Assignments of Error:

That the District Court erred in determining and decreeing as follows:

A. That the plaintiffs cannot maintain this suit because they are voluntary unincorporated associations (Assignments Nos. 1 and 3).

B. That the plaintiffs cannot institute this suit because they do not have a legal interest in the Commission's order and cannot sustain a legal injury by reason of it (Assignment No. 2).

C. That the Commission did not improperly exclude evidence offered by the plaintiffs (Assignment No. 4).

D. That some of the evidence excluded by the Commission was offered by parties other than plaintiffs, and that even if such exclusion was improper plaintiffs cannot complain because that evidence was offered by parties other than the plaintiffs (Assignment No. 5).

Assignments 6 to 9, inclusive, are necessarily determined by the decision upon Assignments 1 to 5.

D. ARGUMENT.

For convenience of the Court, we have inserted as an appendix to this brief, a map showing the Moffat Road, the Moffat Tunnel, the proposed Western Extension, The Moffat Tunnel Improvement District, the counties mentioned in the "Statement of the Case," the Dotsero Cut-Off, and the Rio Grande road. This map is substantially a reprint of Exhibit A (R. 12 A) with some of the unnecessary details eliminated and slightly enlarged.

The case presented may be summarized thus:

The Rio Grande applied to the Commission for authority under Paragraph 2 of Sec. 5 of the Interstate Commerce Act (U. S. C. A., Tit. 49, Sec. 5, Par. 2) for authority to acquire control of the Moffat Road. The Moffat Road was designed to extend from Denver to Salt Lake City, over a route 575 miles long. So far the road has been constructed only to Craig, 234 miles, 43 per cent of the total distance, but in that 234 miles is included the tunnel through the Continental Divide (the Moffat Tunnel). The Rio Grande extends from Denver to Salt Lake City over a route 745 miles long and crossing the Continental Divide at an elevation of 11,000 feet. The Moffat Road extended to Salt Lake City would constitute a substantially parallel line to the Rio Grande, the two

roads meeting at Denver and at Salt Lake City (and probably at Provo, Utah), approaching each other within 42 miles at the points where it is proposed to build the Cut-Off as a connecting link between the two lines.

There is this very exceptional feature in this case, that whilst the Moffat Road balance sheet as of 1929 shows an investment of $16,515,633.88 in Road and Equipment, the Moffat Tunnel District has issued $15,470,000 in Tunnel Bonds, so that the public investment in the properties involved in the Rio Grande application is substantially equal to the railroad's investment, and the public investment is evidenced by bonds which necessitate a continuing charge for interest against the real estate in the District.

These appellants represent three counties in the District and also two counties in Utah, which would be traversed by the Moffat Road if it were extended to Salt Lake or to Provo, Utah, and which two counties are now without railroad facilities.

Before the Commission has authority to grant the Rio Grande's application, it must determine "after hearing"

> "that the acquisition * * * by one of such carriers of the control of any other such carrier * * * by the purchase of stock * * * will be in the public interest"—U. S. C. A., Tit. 49, Sec. 5, Par. 2.

The questions here presented are:

I. Was the hearing held by the Commission a sufficient compliance with the statutory requirement of a "hearing" in view of the testimony excluded by the Examiner?

II. Can these appellants maintain a suit to question the sufficiency of that hearing?

These questions will be discussed under the following headings:

A. Parties having the necessary interest in the subject matter are not debarred from instituting and maintaining a suit to set aside an order of the Commis-

sion merely because they are unincorporated associations.

B. The interest of the appellants in the subject matter of the proceeding before the Commission is sufficient to enable them to maintain this suit to set aside the order of the Commission.

C. That the hearing held by the Commission was insufficient to constitute a compliance with the statute because of the exclusion of material testimony and refusal to consider matters material to a determination of the public interest.

D. That if material evidence was excluded when offered by other interests, appellants were not required to reoffer the same evidence in order to complain of its rejection.

A.

PARTIES HAVING THE NECESSARY INTEREST IN THE SUBJECT MATTER ARE NOT DEBARRED FROM INSTITUTING AND MAINTAINING A SUIT TO SET ASIDE AN ORDER OF THE COMMISSION MERELY BECAUSE THEY ARE UNINCORPORATED ASSOCIATIONS.

The opinion of the lower court states,

> "Unless the statute gives interveners, as such, a right to institute independent suits to enjoin the action of the Commission (and we find none), their right so to institute suits remains as at general law, which is, first, that voluntary, unincorporated associations of persons do not have a legal capacity to sue" (R. 127).

Section 45a, Tit. 28, U. S. C. A., relating to procedure in suits to enjoin orders of the Commission, provides that

> "any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, *may appear as parties thereto of their own motion and as of right*, and be represented by counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party."

Later in the same section is a provision as to who may intervene in such suits "at any time after the institution thereof." It follows, therefore, that the provision just quoted does not relate to an intervention but must refer to original parties.

Construing this section this Court in Baltimore & Ohio R. Co. v. United States, 264 U. S. 258 (68 Law Ed. 667), said this section—

> "declares that any party to a proceedng before the Commission may, as of right, become a party to 'any suit wherein is involved the validity of such order.' The *section does not in terms provide that such party may institute a suit to challenge the order. But this is implied.* For, otherwise, there would in some cases be no redress for the injury inflicted by an illegal order. Moreover, the fact of intervention allowed as it was, implies a finding by the Commission that the plaintiffs have an interest" (Pages 267-8).

Continuing, this Court said:

> "No case has been found in which either this court, or any lower court, has denied to one who was a party to the proceedings before the Commission the right to challenge the order entered therein. On the other hand, persons who were entitled to become parties before the Commission, but did not do so, have been allowed to maintain such suits where the requisite interest was shown. Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 49; (56 Law Ed. 83, 88); 32 Sup. Ct. Rep. 22; Skinner & E. Corp. v. United States, 249 U. S. 557, 562, 63 L. Ed. 772, 776, 39 Sup. Ct. Rep. 275" (268-269)

The above quoted language has a very direct application to this case. Here on the one hand is the Ro Grande anxious to stifle the threatened competition of the Moffat Road; on the other hand there is the Moffat Road with fifty-four per cent of its stock sold to the Rio Grande for $155.00 per share, and the Commission's order requires the Rio Grande

to purchase the minority stock at the same price, if it is offered. Obviously the Moffat Road is not objecting to being swallowed up on such terms. In this connection it should be noted that the Moffat Road was not named originally as a party to the proceeding before the Commission, did not appear at the hearings, and only intervened when the Rio Grande sought to postpone the effective date of the Commission's orders (180 I. C. C. 715). Since neither railroad is interested in representing the patrons of the Moffat Road, the real parties in interest, they necessarily must organize and represent themselves.

Returning to the language of the statute quoted above, it refers to any party or parties in interest before the Commission. Prior to the enactment of this section, 45a, Section 13 of the Interstate Commerce Act (U. S. C. A., Tit. 49, Section 13) provided that

> "any person, firm, corporation, company, association, or any mercantile, agricultural or manufacturing society or other organization"

could be a party before the Commission. This provision has always been construed by the Commission as permitting voluntary unincorporated associations to become "parties" to any proceeding before the Commission (see Interstate Commerce Acts Annot., pages 1746-7, Note 33).

In McLean Lumber Co. v. U. S., 237 Fed. 460 (Tennessee 3 Judge Court), the court after citing the statutory provision here under discussion, said:

> "Construing the foregoing provisions of the Commerce Court Act in their entirety, we are of the opinion it was intended that any person who had acquired a standing as a party in interest in proceedings before the Commission *should have the right to appear as a party in any suit brought in the court involving the validity of an order therein made by the Commission, as distinguished from the mere right of intervention given to other persons who were not parties in interest before the Commission, but merely 'inter-*

> *ested in the controversy in question,' and that the right thus given to a party in interest before the Commission is not limited to his appearance as an intervener in such proceedings as may be instituted by other parties in interest before the Commission, but includes the right to appear in the court as a party plaintiff in proceedings which he himself may bring to test the validity of the order of the Commission*" 467-8).

In that same case the court directs attention to Merchants Association v. U. S., 231 Fed. 292 at 294, where it was held

> "that traffic associations, formed for the purpose of representing merchants in traffic matters, were entitled to bring a petition in equity to enjoin the enforcement of orders of the Commission"

even though the Commission specifically objected that such association, not being itself a shipper, had no interest in the order.

In the case of Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42 (56 Law. Ed. 83), in the trial court *the Transportation Committee of the Board of Trade of Kansas City*, the Omaha Grain Exchange and certain individuals, representing the Atchison Board of Trade, filed their bill alleging that the enforcement of the Commission's order

> "would depreciate the value of their elevators, and their investments in these and other facilities for the transfer, purchase, and sale of grain in their cities by depriving them of compensation for its transfer, would draw away from their cities to eastern, northern and southern marts a large volume of their grain business, and would tend to diminish the grain markets in their cities to their irreparable injury." Diffenbaugh v. Interstate Com., 176 Fed. 409 (415-6).

The lower court said:

> "'The Interstate Commerce Act authorized incorporated boards of trade of cities and *associations of like character* to apply to the Commission for relief, and such corporations and members representing such associations may likewise apply to the courts for relief from injuries unlawfully afflicted by the Commission" (415).

This Court, reviewing that case, said:

> "The jurisdiction in the Diffenbaugh case was doubted, although the Commission did not press the point, as it wishes a final decision. We are content to leave that matter on the statement of the court below, 176 Fed. 416-7. The plaintiffs are affected by the order, and it is just that they should have a chance to be heard, although not parties before the Commission" (49).

In Village of Hubbard, Ohio, v. U. S., *et al.*, 278 Fed. 754, Dist. Ct. E. D., 3 Judge Court, Op. by Dist. J. Westenhaver, it was said:

> "The first proposition to be considered is whether defendants' objection is sound, that the plaintiff is without interest in the controversy and has no standing. * * * The village of Hubbard was served by the Interstate Commerce Commission with a copy of its order of investigation, appeared and was heard. * * * *It has long been the practice to permit representative associations and exchanges to institute and maintain proceedings before the Commission and to be heard in court against its orders.*"

The further provisions of Section 45a also clearly indicate that Congress intended that unincorporated associations, having the necessary interest in the subject matter, can prosecute a suit to enjoin the Commission's orders. The provision relative to who may intervene in such suit specifically includes "communities and associations," and then provides that such interveners, which includes communities and

associations, can, in case of non-action of the attorney general, "prosecute, defend or continue such suit." Certainly if an unincorporated association which comes into such a suit by way of intervention is competent to prosecute and continue such suit, it is illogical to say that Congress intended that a similar unincorporated association is incompetent—merely because it is unincorporated—to institute the suit.

In the light of the foregoing statutory provisions, and the decisions, it must be assumed that Congress was well advised that unincorporated associations are frequently parties in interest to proceedings before the Commission, and that when it provided unqualifiedly that

> "any party or parties in interest to the proceedings before the Commission"

may appear as of right in suits to set aside orders of the Commission, it intended to include all organizations and individuals which could be parties in interest before the Commission. Therefore, we submit, the lower court erred in holding that these appellants could not maintain this suit because they were unincorporated organizations.

B.

THE INTEREST OF THE APPELLANTS IN THE SUBJECT MATTER OF THE PROCEEDING BEFORE THE COMMISSION IS SUFFICIENT TO ENABLE THEM TO MAINTAIN THIS SUIT TO SET ASIDE THE ORDER OF THE COMMISSION.

The second point decided by the District Court was that the plaintiffs (appellants)

> "If otherwise capable to sue, they must have a legal right arising from a legal interest, the denial of which inflicts or threatens a legal wrong" (R. 127),

and the court held that these appellants have no such interest in this case.

In support of this finding the court cites, among other cases, Pennsylvania Railroad Co. v. United States, 40 Fed. (2nd) 921, Indian Valley R. R. Co. v. United States, 52 Fed. (2nd) 485.

In each of those cases the basis of the respective plaintiffs' complaints was that theretofore they had exclusively enjoyed traffic which was affected by the Commission's order; that, as they alleged, the Interstate Commerce Commission by an illegal order had created competition for that traffic, and that by reason thereof they were injured. In each case the trial court held that the Commission's order did not subject them to any injury of which they could complain; the substance of the decision in each case may be illustrated by a short quotation from the Pennsylvania case:

> "True, the complainant now is and for a long time has been exclusively serving Donora and is now receiving the profits from handling all the traffic flowing in and out of that busy district. But that is a privilege rather than a right—a privilege to be enjoyed so long as it shall last, not a right to be asserted, unless it be found somewhere in the law, written or unwritten. Certainly there is no unwritten law that gives a carrier, first to serve a community, the right to hold its traffic against all competitors" (925).

This holding, we submit, is contrary to the later decisions of this Court.

In Claiborne-Annapolis Ferry Co. v. United States, 285 U. S. 382 (76 Law. Ed. 808), the Ferry Co. complained of an order of the Interstate Commerce Commission permitting the Chesapeake Beach Ry. Co. to operate a ferry for the transportation of passengers and property across Chesapeake Bay. The complaint of the Ferry Co. was that the order would permit the Railway Company to compete with the Ferry Company unless the order was redrawn so as to restrict the ferry operations of the railway company. The Interstate Commerce Commission appeared in that case before this court and contended that the Commission's order did not invade any legal right of the Ferry Company, and in that connection cited Pennsylvania Railroad Co. v. United States, 40 Fed. (2nd) 921, *supra*. In answering that contention this Court said:

> "The bill disclosed that the proposed and permitted action might directly and adversely affect its (the Ferry Company's) welfare by changing the transportation situation."

Therefore the Court held that the Ferry Company was a party in interest capable of instituting the injunction suit. In Western Pac. C. R. Co. v. Southern Pac., 284 U. S. 47 (76 Law. Ed. 160), the Western Pac. C. R. Co. applied to the Interstate Commerce Commission for authority to construct a proposed road. The Southern Pacific appeared in opposition to the application. The Southern Pacific also commenced to lay tracks of its own for the purpose of impeding and preventing the Western Pacific's proposed construction, and to secure traffic which the Western Pacific's proposed extension would have secured to it. The Western Pacific instituted suit to enjoin the Southern Pacific from proceeding with the extension until it had secured authority from the Interstate Commerce Commission to make such extension. The question was raised whether the Western Pacific could be considered as "a party in interest" authorized to maintain such an injunction suit. This Court said:

> "It will suffice, we think, if the bill discloses that some definite legal right possessed by complainant is seriously threatened, *or that the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation.* The disclosures of the bill were enough to show that the respondent's intended action might directly and seriously affect the project which complainant was undertaking in good faith. There was enough to give the latter the standing of a 'party in interest' within the intendment of the Act."

We particularly direct attention to the language above quoted, that complainant's interest is sufficient if it shows an invasion of "some definite legal right," or "that the unauthorized * * action * * may directly and adversely affect

the complainant's welfare by bringing about some material change in the transportation situation." In support of the decision in the Western Pacific case, *supra*, this Court referred to its decision in Texas and P. R. Co. v. Gulf C. & S. F. R. Co., 270 U. S. 266 (70 Law. Ed. 578), and in that respect said:

> "The Texas and Pacific Railway sought to prevent an unauthorized competitor from building an extension into territory already served by it. Prior to the statute, it could not have maintained such a suit, since the competitor's proposed action did not threaten interference with any legal right. No carrier could then demand exemption from honest competition. If, as the court below seemed to have assumed, a 'party in interest,' must possess some clear legal right for which it might ask protection under the rules commonly accepted by courts of equity, the paragraphs under consideration would not materially aid the congressional plan for promoting transportation. On the other hand, there was no purpose to permit any individual so inclined to institute such a proceeding. The complainant must possess something more than a common concern for obedience to law."

The decision in the Claiborne and Western Pacific cases, *supra*, clearly show that the decisions in the Pennsylvania Railroad Company case, *supra*, and the Indian Valley Railroad Company case, *supra*—relied upon as authority by the lower court in this case—are in conflict with the construction which this Court has placed upon the meaning of the term "party in interest" in the statute here under consideration. We may take it, then, that the established construction of Section 45a of Title 28, U. S. C. A., is that if by an unlawful act a carrier is proposing, "by changing the transportation situation," to adversely affect the interest of one who was a party to the proceedings before the Interstate Commerce Commission, such party may institute a suit such as the one at bar. It is therefore contended by these appellants that the lower court in this case erred in construing the rights granted by said Section 45a too narrowly.

We will next discuss whether appellants have brought themselves within the broad construction given to Section 45a by this Court. In Baltimore & Ohio R. R. Co. v. United States, *supra*, this Court said:

> "Moreover, the fact of intervention, allowed as it was, implies a finding by the Commission that the plaintiffs have an interest. In the proceeding before the Commission, they opposed by evidence and argument the grant of this application. This they did as of right. For under the rules of practice, adopted by the Commission pursuant to Par. 1 of Sec. 17 of the Interstate Commerce Act, the intervener becomes a party to the proceeding, entitled, like any other party, to appear at the taking of testimony, to produce and cross-examine witnesses, and to be heard in person or by counsel. The intervention must be preceded by an order of the Commission granting leave, and leave can be granted only to one showing interest."

The fact, therefore, that in this case these appellants were permitted to intervene before the Commission and, as the record shows, introduced testimony, cross-examined witnesses, and throughout actively opposed the granting of the application, creates a prima facie case that these appellants are "parties in interest" within the provisions of Sec. 45a.

For the purpose of determining the interest of appellants in the application, the testimony which was offered and which was excluded at the hearing is obviously pertinent. These appellants represent the property owners and business interests of three counties in western Colorado and two counties in eastern Utah. All of the real estate in the three counties in Colorado has been subjected to the lien of the Moffat Tunnel Bonds. All of these three counties lie beyond Orestod, where the Cut-Off will begin, so that if the application is granted, instead of being on the main line of a local Colorado road these counties will be served only by a stub branch of the Rio Grande, which in turn is controlled by the Missouri Pacific and the Western Pacific roads, foreign roads having no interest in Northwestern Colorado. Testimony was offered

to show that the Rio Grande was opposed to the construction of any western extension of the Moffat Road beyond Craig; that in determining the benefits which would result to lands in Western Colorado from the construction of the Moffat Tunnel, the Tunnel Commission took into account the increase in value of such lands which would result from such an extension of the Moffat Road, which extension, it was assumed, would result from the Tunnel construction; that such extension would result in increase of value to lands in the western part of Moffat County, which in turn would result in a decrease of the assessments in Grand and Routt Counties; that one of the principal items of traffic of the Moffat Road is coal and that the Rio Grande would naturally be interested in developing the coal traffic on its own lines in Utah instead of the Moffat Road traffic; that the Rio Grande could divert a considerable amount of other traffic from the Moffat Road to the Rio Grande; that the communities represented by appellants were entirely dependent upon the Moffat Road and its development for railroad facilities, and that the granting of the application would frustrate that development and leave this portion of the Moffat Road a mere branch line controlled by a railroad interested in diverting traffic to a competing line. All of this would not only change the transportation situation but would adversely affect the value of lands in the counties represented by appellants and as to lands in the counties of Colorado so represented, would defeat the very purpose for which the owners consented that their lands become subject to the lien of the Tunnel Bonds.*

The interest of these appellants is therefore not only their interest as communities dependent upon the Moffat Road for railroad facilities, but also in the case of the Moffat Tunnel League, the interest as representatives of owners of property within the Moffat Tunnel Improvement District which is being assessed to pay for the Tunnel, which Tunnel is directly involved in this proceeding.

It may be suggested that it is the function of the Moffat

*Section 3 of the Moffat Tunnel Act provided for the defeat of the measure and the project upon remonstrance of fifty per cent in value of the lands in the District.

Tunnel Commission to represent the property owners of the Moffat Tunnel Improvement District. In that connection it is pertinent to notice the changes which have been made in the Moffat Tunnel Act since 1922. Section 4 of Chapter 2 of the Session Laws of Colorado (Special Session), 1922, provided for the management of the District by a board of five members to be known as the Moffat Tunnel Commission. The first Board was to be appointed by the Governor to hold office until August 31, 1923; future commissioners were to be elected, and for that purpose the District was divided into two divisions, Division 1, the portion lying east of the Continental Divide, and Division 2, the portion lying west of the Divide. In 1927 the Legislature enacted Chapter 131 of the Colorado Laws of 1927, which provided that the Governor should thereafter appoint the members of the Moffat Tunnel Commission, and that three of the members must be appointed from Division 1 and two from Division 2. In 1931, by Chapter 116 of the Session Laws of Colorado (which was enacted after the decision of the Commission in this case), the right to elect the commissioners was restored to the electors of the two divisions of the District, and the Governor's power to appoint members was taken away, except in the case of vacancy—the Governor can appoint a member to fill such vacancy for the unexpired term only. This legislative history is significant, first, because it has been recognized right along that the District should be divided into two divisions, the one east and the other west of the Continental Divide, and second, that after experimenting with commissioners appointed by the Governor, the Legislature found it necessary to restore to the electors of the Tunnel District the direct control over the membership of the Commission. The interests of communities west of the Divide will not always coincide with those of the communities east of the Divide, therefore the Legislature provided for dividing the district into the two divisions.

The statute under which the Rio Grande made its application provides that the Commission shall grant authority to one railroad to acquire control of another railroad by stock purchase, only when, "after hearing", the Commission deter-

mines that such acquisition is in the public interest. Under the statute, therefore, the Commission could not make any lawful order in the premises until it held such a hearing. Assuming appellants are correct in their contentions concerning the insufficiency of the hearing which the Commission held, then, if they are adversely affected by such order, they have been deprived of their legal rights by the order here under attack.

We submit, therefore, that the record discloses an interest on the part of these appellants which establishes that they are "parties in interest" within the meaning of Section 45a aforesaid, and entitled to maintain this action.

Two decisions by this Court are cited by the lower court in support of its ruling; Sprunt and Son, *et al.*, v. United states, *et al.*, 281 U. S. 249 (74 Law. Ed. 832), and Pittsburg & W. V. R. Co. v. United States, *et al.*, 281 U. S. 479 (74 Law. Ed. 980).

In the Sprunt case the Commission on its own motion conducted a general investigation into complaints that cotton shippers located along the water front were being unlawfully favored by the carriers and that shippers located uptown were being unlawfully discriminated against. The Commission found the discrimination existed, and entered an order requiring the discrimination to be removed. Separate suits were filed to enjoin the Commission's orders, one by some of the carriers, one by the shippers who had been the recipients of the advantages condemned by the Commission. The carriers discontinued their litigation, and complied with the Commission's orders, the shippers attempted to continue their suit. This Court held they could not do this, because (a) since the carriers had established the rates a judgment setting aside the Commission's order would be futile because the carriers still would be free to maintain the new rates; (b) the shippers had not been deprived of any right, since they were merely entitled to reasonable rates, and if such rates were accorded to them they could not complain of the loss of a competitive advantage to which they were not otherwise entitled; (c) if the rates resulting from the Commission's order were unreasonable, that question had been ex-

pressly left open by the Commission, so that the shippers' remedy was in that event by a proceeding before the Commission and not by a suit in court.

In the Pittsburg W. V. R. Co. case, the Pittsburg road's interest in the Commission's order was as a stockholder in the Wheeling,

> "and there is no suggestion that the order can affect it as a carrier" (487).

The attack upon the order was not based upon carrier considerations or upon the question that the Commission had not decided according to public interest, but solely as to the effect of the Commission's order upon the interest of a stockholder in the Wheeling Road. This Court specifically pointed out that the case—even as to an investor's interest—was unlike orders

> "in some cases of acquisition of control of one carrier by another" (487).

We submit that in neither of these two cases is there any analogy to the case at bar, and therefore they are not even persuasive in this case.

C.

THAT THE HEARING HELD BY THE COMMISSION WAS INSUFFICIENT TO CONSTITUTE A COMPLIANCE WITH THE STATUTE BECAUSE OF THE EXCLUSION OF MATERIAL TESTIMONY AND REFUSAL TO CONSIDER MATTERS MATERIAL TO A DETERMINATION OF THE PUBLIC INTEREST.

A short review of the historic background of the Colorado railroad situation as shown by the previous decisions of the Commission and of this Court may throw light upon the situation here involved.

The importance of the Moffat Road to Northwestern Colorado was thus stated by the Commission:

> "The continued operation and proper maintenance of the transportation services of the Moffat Road are of vital importance to Grand, Routt, Moffat, and Eagle Counties, having an estimated population of 26,000,

served exclusively by it, and are also of importance to the City of Denver and to the Federal Government. The investment in coal-mining properties in the Oak Hills District, an area of about 1,200 square miles, is estimated at from seven to ten million dollars. The production of coal has averaged a million tons per year for the last six years. On account of the good storing qualities of the coal it finds a ready market in Kansas and Nebraska as well as in Colorado. In this region west of the Continental Divide there are about 600,000 acres of Government land, 400,000 of which are underlaid with workable veins of coal, and some with copper ore. This region contains a stand of more than a billion feet of merchantable timber and produces 15 per cent of the cattle grown in Colorado. *We have no question that there is public necessity for the continued operation of the Moffat Road.*" Freeman and Boettcher v. A. T. & S. F. Ry., 73 I. C. C. 178 at 183.

Discussing the purposes which justified the Legislature in enacting the Moffat Tunnel Law, this Court said:

"They (the objectors to the Tunnel Bill), however, contend that the tunnel must be deemed for a private, rather than a public purpose, because it is located so as to be practically a part of the line of the Moffat Road, and is intended for its use, *the real object of the act being,* as expressed by the governor, *ta save this railroad to the people of the State. There is virtually no denial of this; and evidently this was the motive which led to the passage of the act, and is the primary purpose for which the tunnel is to be constructed.* This, however, is not a private purpose. The use of the tunnel by the Moffat Road will be for a beneficial public purpose. This railroad runs from Denver, on the east of the Continental Divide, to Routt County in the northwestern corner of the state, a distance of 255 miles. It crosses the divide by a circuitous route above this tunnel, with steep grades and heavy curves. In the winter seasons this portion of its line is almost

impassable. Its operations result in heavy losses, and it is now in an embarrassed financial condition and unable to build the tunnel. Without the use of the tunnel, the railroad must, it seems, be abandoned; and this avenue of communication between different portions of the state will be lost. The use of the tunnel will reduce the elevation, grades, and curvature of the railroad, shorten its line about 23 miles, and save it large amounts annually. *Evidently the preservation of this railroad, a common carrier of persons and property, as a means of communication between the eastern and northwestern portions of the state, is a matter of great public importance; and a tunnel enabling it to provide quicker and cheaper transportation during all seasons of the year will greatly promote the public welfare.*" Milheim v. The Moffat Tunnel District, 262 U. S. 710 (718-719) (67 Law. Ed. 1194).

These decisions show the public importance of the Moffat Road, particularly to the public in the counties represented by the Moffat Tunnel League.

The evidence in this case shows that the control of the Rio Grande is held one-half by the Missouri Pacific and one-half by the Western Pacific interests. In that situation the following excerpts from the opinion of the Commission in an investigation instituted on its own motion in 1921, into the history of the Rio Grande (the opinion was handed down July 6, 1926) are pertinent. The title of the proceeding was: Denver and Rio Grande Investigation—*In Re* Accounts, Financial Operations, and Practices of Western Pacific Railway Company, Denver & Rio Grande Railroad Company, Western Pacific Railroad Company, and Denver & Rio Grande Western Railroad Company. 113 I. C C. 75.

"The significant feature of these disclosures were that development of the territory served by the New Denver's* existing lines had been retarded by the character of the service rendered and the high rates

*The Commission designated the Rio Grande as "New Denver" to distinguish it from its predecessor, which was designated the "Old Denver".

charged, and that, if a considerably smaller sum than that advanced to the Western Pacific had been expended in modernizing the New Denver's own service, rapid increases in traffic and earnings would almost certainly have resulted therefrom" (110).

"A majority of the Old Denver directors were likewise directors of the Missouri Pacific and the record leaves no doubt that their judgment as to the interests of the Old Denver and its subsidiary, the Western Company, was influenced by their concern as to the welfare of the Gould System, considered as a whole. * * * * It is reasonably certain that if one-half of the money advanced to the Western Pacific by the New Denver, had been expended in properly maintaining and improving its own service, the resulting benefits would have greatly exceeded any possible benefits which it might have derived from providing the Gould roads with their Pacific coast connection. * * * *In brief, shortly after the Missouri Pacific control had been established over them, the Denver companies, theretofore profitably and conservatively managed, were committed to an unwise speculation which was intended to benefit all railroads of the Gould System, whereas its risks would be borne by the Denver companies alone*" (157).

"*That commitment caused the diversion to the support of another railroad of many millions of dollars which normally would have been used for the improvement of the New Denver's own service and for the maintenance of a sound financial position. Deprived of an efficient and modern railroad service, the agricultural and industrial growth of the country tributary to the New Denver lines was retarded and entire communities were thereby subjected to heavy losses.* Finally the obligations under that commitment brought about the New Denver's insolvency and the resulting enormous losses to its security holders" (159).

These decisions present the picture which confronted the appellants when the Rio Grande made its application to be

allowed to purchase control of the Moffat Road, which included the lease on the Moffat Tunnel.

It now becomes important to consider what investigation the Commission should have made in order to decide whether granting the Rio Grande application was in the public interest.

In Baltimore & O. R. Co. v. United States, *supra*, this Court, having under consideration this same Paragraph 2 of Section 5 of the Interstate Commerce Act, stated:

> "Upon application of a carrier, the Commission must form a judgment whether the acquisition proposed will be in the public interest. It may form this judgment only after hearing. *The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it.* To refuse to consider evidence introduced, or to make an essential finding without supporting evidence, is arbitrary action" (265).

In Colorado v. United States, 271 U. S. 153 (70 Law. Ed. 878), the carrier had petitioned for a certificate that "present and future public convenience and necessity permitted the abandonment" by it of a certain branch line. In deciding what factors the Commission should consider on an application of that character, this Court says:

> "The sole test prescribed is that abandonment be consistent with public necessity and convenience. In determining whether it is, the Commission must have regard to the needs of both intrastate and interstate commerce. For it was a purpose of Transportation Act 1920, to establish and maintain adequate service for both. (Citing authorities.) The benefit to one of the abandonment must be weighed against the inconvenience and loss to which the other will thereby be subjected. *Conversely, the benefits to particular communities and commerce of continued operation must be weighed against the burden thereby imposed upon other commerce.* (Citing authorities.) The result of this weighing—the judgment of the Commission—is ex-

pressed by its order granting or denying the certificate" (168).

"*In some cases, although the volume of the whole traffic is small, the question is whether abandonment may justly be permitted, in view of the fact that it would subject the communities directly affected to serious injury while continued operation would impose a relatively light burden upon a prosperous carrier.* The problem and the process are substantially the same in these cases as where the conflict is between the needs of intrastate and of interstate commerce. *Whatever the precise nature of these conflicting needs, the determination is made upon a balancing of the respective interests—the effort being to decide what fairness to all concerned demands*" (168-169).

The case of Transit Commission v. United States, 284 U. S. 360 (76 Law. Ed. 342), also involved a proposed abandonment, and the question was as to public convenience and necessity. In that case this Court said:

"*In reaching these conclusions the Commission considered the needs of the communities served, and gave due regard to them.* It was shown that the city authorities had refused to take over the line, when the company offered to convey it, on the ground that the territory could be adequately served by bus transportation. Moreover, the company could not maintain satisfactory schedules on the branch, because of congestion in the tunnels under the East River, and without better schedules could not hope to increase use of this line. It was in evidence that the company's offer to establish an adequate bus system had not been accepted by the city authorities. There was other proof, which need not be detailed, as to the intrastate traffic needs. All these matters were given due consideration by the Commission in reaching its ultimate conclusion. It followed the course outlined in Colorado v. United States, *supra*, and the claim that its action was beyond its authority and without warrant of law cannot be sustained" (368).

At the end of the opinion in that case this Court further said:

> *"The evidence was ample to give a comprehensive view of the entire situation, and due weight was accorded all of the proofs in the light of the conflicting requirements"* (370).

It is evident from these decisions that it was the duty of the Commission in this case, where its function was to protect the public interest, to grant a full hearing and to consider the effect of the granting of the application wherever it affected the public interest.

The dissenting opinion of Commissioner Eastman is important in this regard, because it shows that even with appellants' evidence ruled out, this Commissioner found that it was not established that granting the application was in the public interest. If appellants' testimony had been admitted, it might have brought other Commissioners over to Commissioner Eastman's views.

With these principles in mind as to what the Commission should consider, we wish to direct the Court's attention specifically to the character of the evidence which was excluded. As previously stated, the Commission found that one of the reasons why the granting of the application was in the public interest was that it would facilitate the construction of the Dotsero Cut-Off, because if the Rio Grande controlled the Moffat Road it would be easier for the two roads to reach an agreement. A reading of the Commission's opinion (Exhibit C, R. 17-34), compels the conclusion that the construction of the Cut-Off was one of the principal factors which influenced that decision. All evidence relative to the effect of the proposed acquisition upon the Dotsero Cut-Off was excluded by the Examiner. At the opening of the hearing the Examiner objected to references in the petitions of intervention of these appellants to the Dotsero Cut-Off, stating,

> "I am not hearing the Uintah case, the Dotsero Cut-Off or any of those cases (R. 62),

and frequently during the hearing the same statement was repeated by the Examiner.

The testimony of Mr. Williams, the principal witness for the Rio Grande, made frequent references to the Cut-Off. Appellants' counsel therefore began to inquire of Mr. Williams as to how the construction of the Cut-Off was to be financed. Without any objection being raised by any counsel present, the Examiner interrupted,

> "There is nothing about the financing of the building of the Dotsero Cut-Off before us in this proceeding. Don't go into that" (R. 74).

If we may be pardoned for going outside of the record in this regard, the subsequent history has shown that this inquiry was important, because the Rio Grande later had to secure a loan from the Reconstruction Finance Corporation before it could even start construction of the Cut-Off.

The pertinence of this inquiry is shown also by the Dissenting Opinion of Commissioner Mahaffie, concurred in by Commissioners Eastman and McManamy, to the order of the Commission in this case, 184 I. C. C. 721, as follows:

> "Because I was convinced that the Dotsero Cut-Off was highly desirable and that its construction would be assured if the Denver & Salt Lake were acquired by the Rio Grande, I voted to approve that acquisition. The Rio Grande cannot at present proceed with the acquisition. Nor with the construction. It asks further delay. It can promise nothing as to any definite program at the end of a future period of time. In the meantime, no one else can proceed. I have no reason to believe that the construction can be arranged in the near future, whether we grant or deny this request. But I believe we are not justified in permitting any further delay in order to see whether the Rio Grande can make good. It has already had a good deal of time and has not done so. Possibly some other interest can. Denial of this request would at least afford an opportunity to try. That opportunity, I think, should be made available."

It is conceded by all that there was a strong public demand that the Cut-Off be constructed. The Moffat Road had already made application for leave to construct the Cut-Off and had been denied that leave until it should reach a satisfactory trackage agreement with the Rio Grande. The only hearing on the Dotsero Cut-Off proposition was the one on the application of the Moffat Road. Here was a new situation where the Moffat Road was to be taken over by the Rio Grande and therefore the financing of the Cut-Off would be accomplished through the Rio Grande channels. There was therefore presented in this case an entirely new feature which could not possibly have been investigated in the previous cases, and it affected one of the principal grounds upon which it was contended that the granting of the application was in the public interest. Obviously, then, it was the duty of the Commission to permit the fullest investigation into this feature of the situation, instead of which all inquiry was barred.

As previously stated, the Moffat Tunnel was constructed as a public enterprise by the issue of bonds which are a lien upon all of the real estate in the Moffat Tunnel Improvement District. The total par value of these bonds almost equalled the investment account in Road and Equipment of the Moffat Road. The owners of real estate in this District certainly constitute an important part of the public whose interest the Commission must consider. The Examiner excluded all evidence relating to the history leading up to the Act under which the Tunnel was constructed, the purposes for which the Tunnel was constructed, and particularly evidence that the purpose of constructing the Tunnel was to insure the construction of the road beyond Craig, at least as far as the Colorado state boundary line.

Sufficient evidence was introduced to show that the Rio Grande had actively opposed the construction of any extension of the Moffat Road west from Craig. Therefore there was presented to the Commission a situation where the granting of the application would probably block any western extension of the Moffat Road. In balancing the public interest, as the Commission was required to do, it was ob-

viously necessary for the Commission to determine whether the benefits resulting from the granting of the application would offset the detriment to the territory which would be served by a western extension of the Moffat Road. In order to determine that, it was necessary to show what were the requirements of that territory, what were the traffic possibilities, and it was material to show that the territory had been built up largely on the promises made by the Moffat Road and public agencies that such railroad facilities would be furnished to that territory. All evidence of that character was excluded by the Examiner, and the exclusion went to such extreme lengths that after Witness Johnson had testified that Craig, the western terminal of the Moffat Road was only seven miles west of the eastern boundary of Moffat County, and he was asked by counsel for the appellants what the distance was from Craig to the western boundary, of Moffat County, an objection to the question was sustained by the Examiner and even such an innocent matter as that was excluded from the record.

The map contained in this record and the evidence shows that if a main line is created consisting of the Moffat Road from Denver to Orestod, the Cut-Off to Dotsero, and the Rio Grande road to Salt Lake, then that part of the Moffat Road beyond Orestod becomes merely a stub branch ending at Craig and having no connection with a main line except at Orestod. The Commission's reports are full of cases of abandonment of branch lines, including several cases in the State of Colorado. It therefore became very important for these appellants to consider whether traffic which could move either via the Moffat Road to points west of Orestod, or via the Rio Grande, could be diverted by the Rio Grande from the Moffat Road. If traffic could be so diverted, then it would be easy for the Rio Grande to create a situation which would justify an application to abandon the Moffat line west of Orestod. We therefore offered evidence to show that in connection with the building of the Hoover Dam, large quantities of construction material for use in constructing catch basins on the upper portions of the Colorado River, would be required, and this traffic could

easily be diverted by the Rio Grande from the Moffat Road to its own road. Also, we offered testimony to show that one of the principal items of the Moffat Road's traffic was coal from Routt County, and that this coal was competitive with coal from the western end of the Rio Grande road. Having in mind the part control of the Rio Grande by the Missouri Pacific, it will be easily seen that the Missouri Pacific's interests would be to move Utah coal over the Rio Grande to Pueblo and then over the Missouri Pacific to the Missouri River, and intermediate points, rather than to have coal from the Moffat Road come to Denver and then probably move to the Missouri River by one of the prairie lines reaching Denver (the Missouri Pacific does not reach Denver). The disastrous effect of such a shifting of the coal movement upon Routt County (the coal on the Moffat Road is principally located in Routt County, is very apparent. These appellants therefore were confronted with this threat, that whilst all of their property had been bonded to pay for the Moffat Tunnel, the value of their lands and of the industries in their counties might very easily be destroyed by the action of the Rio Grande if it got control of the Moffat Road. Surely these were material matters which the Commission should have considered in weighing the question of public interest, but all such evidence was excluded. Similar evidence was considered material by the Commission in Proposed Acquisition and Control of Virginian Ry., 117 I. C. C. 67.

> "The N. & W. controls the Pocahontas Coal & Coke Company, which owns 298,340 acres of the low-volatile coal lands of southern West Virginia. These coal fields are in competition with those served by the Pennsylvania Railroad in Pennsylvania. The testimony is that the Pennsylvania is the greatest coal-carrying road in the country, and that it has always opposed any great development of the New River and Kanawha, W. Va., fields. Certain of the protestants allege that the execution of the proposed lease would give to the Pennsylvania the means and power of stifling the development of the low-volatile fields of

southern West Virginia as competitors of the Pennsylvania fields; that the Pennsylvania's interest in the N. & W. is a constant menace to the southern West Virginia coal operator; and that the adding of the Virginian to the N. & W., as contemplated by the proposed lease, would be destructive to the public interest" (74-75).

"The Logan County Coal Operators' Association is composed of approximately 60 companies operating in Logan County, W. Va., on the Guyandot division of the C. & O. In 1925 the Logan district produced approximately 18,000,000 tons of high-volatile coal which moved both to eastern and western destinations. The Logan coal operators for years have desired a connection with and the operation of the Virginian by the C. & O. and have felt that the natural physical situation and location at some time would bring this about. It is testified that if the Virginian should be acquired by the C. & O. and a connecting line built from Gilbert to Elmore, it would shorten the distance for the movement of Logan coal to tidewater and eastern markets by approximately 138 miles. It is claimed by these protestants that if the N. & W. acquires the Virginian the natural result would be to deprive the mines in the Logan field of their eastern outlet, thereby stifling the growth and prosperity of this field" (80-81).

"The chief traffic official of the N. & W. testified that under unified operation of the Virginian and N. & W. the use of the Deepwater route would be discouraged, but that it would be kept open if found to be an efficient route. No reason appears why the N. & W. would be interested in maintaining a competitive through route via Deepwater, which would short haul its own traffic. As heretofore pointed out, a substantial volume of traffic moves through the Deepwater gateway, and this traffic would be increased largely if the Virginian should join the C. & O. in rates on westbound coal.

"Under the proposed lease all competition between the lines of the two companies would be eliminated. Important shipping points would be deprived of competitive service. The president of the Virginian testified that the elimination of competition in rates and service would injure any town through which the two roads pass, and this conclusion is corroborated by the testimony of the protestants" (84-85).

"Applications for authority to acquire control of railroads under the Interstate Commerce Act must be supported by a clear and strong showing of public gain. If serious doubt exists regarding the wisdom of the proposed grouping, that doubt must be resolved against the applications. Real and substantial advantages of railroad grouping are capable of reasonable proof. So are the disadvantages. There must be of record a substantial preponderance of evidence in favor of an application before we are warranted in giving it favorable consideration" (85).

In considering this situation it is important to recall the quotation from the Commission's own decision on its investigation of the Rio Grande, that under the domination of the Missouri Pacific it had neglected Colorado territory in order to foster a transcontinental line, and it was very apparent from Mr. Williams' testimony in this case that the controlling influence back of this application was the consideration of making the Rio Grande a link in a transcontinental line, and that that consideration outweighed all consideration of local interest.

We respectfully submit that it was the duty of the Commission to consider in this case all of the evidence that was offered concerning the needs of the territory between Craig, Colorado, and Provo, Utah, for railroad facilities, the traffic which that territory could offer, the purposes back of the public financing of the Moffat Tunnel, the probable effect upon a western extension of the Moffat Road of the Rio Grande control, and the effect of such control upon the value of the lands subject to the Moffat Tunnel assessments.

The question of the location of railroads and of extensions thereof, have always been regarded by the courts of this country as questions of public interest, and officers of railroads held as public agents in matters relating thereto,—Woodstock Iron Co. v. Richmond and D. Extension Co., 129 U. S. 643 (32 Law. Ed. 819)—and officers of railroads are forbidden to consider private advantages in such matters to the detriment of public interest. It therefore was certainly material to show in this case that public interest required the western extension of the Moffat Road, whereas the Rio Grande was interested in preventing such extension.

We submit that without a consideration of all of those factors the Commission could not be fully advised of the public interest and therefore could not determine whether the granting of the application was or was not in the public interest. We are not overlooking the statement of the lower court, that without the granting of the application there was

> "no immediate prospect of building the Cut-Off, which everyone wants, and certainly no prospect even remote of an extension of the Moffat Road from Craig to the west" (R. 129).

In that connection we direct the Court's attention to the fact that the record clearly shows that the Moffat Road had been ready since 1928 to build the Cut-Off, and that if it had not been for the objections of the Rio Grande, undoubtedly the Cut-Off would have been built and in operation long since. The pessimistic attitude of the lower court as to the extension west of Craig, that there is "certainly no prospect even remote of an extension," seems to us to be hardly warranted. The exhibits of record show that in round figures, the net income of the Moffat Road for 1926 was $323,000 deficit; 1927, $132,000 deficit; 1928, the first year the road began operating through the Tunnel, and after paying the Tunnel rentals, $392,000 surplus; and in 1929, after paying the Tunnel rentals, $610,000 surplus. Such a showing seems to justify Mr. Moffat's original idea that this road could be made a successful paying road. Further in this regard, without either the Commission or the Court hearing as to

what the traffic possibilities are in the territory beyond Craig, it is difficult to find that the western extension is not justified and is not even remotely probable. Further, the statement of Commissioner Eastman (Ex. C, R. 35) is pertinent on this point:

> "On the other hand, the evidence indicates that the Denver & Salt Lake, if it were allowed to remain as an independent carrier, would be in a reasonably strong position. Its earnings are now good enough, if the majority are right, to justify the payment of $155 per share for its common stock. At its eastern end, it connects with the Union Pacific, the Burlington, and the Rock Island, the last two roads, particularly the strong Burlington system, having no adverse interest which conflicts with the development of the new Denver route. At its western end, it is to be connected, by a comparatively small expenditure and under authority which we have already granted, with the Denver & Rio Grande Western, *and there is also the possibility of an extension west from Craig to Salt Lake City. This was a part of the original project, and it is not to be dismissed as an impracticable plan, particularly if one of the eastern connections of the Denver & Salt Lake should be interested in it.* As an independent carrier, also, the Denver & Salt Lake would, I believe, be in a better position to negotiate divisions with connections than if it becomes a minor satellite of the Missouri Pacific system."

In any event, those were all matters which should have been considered by the Commission before determining to hand over this prosperous local Colorado road to the Rio Grande, controlled by the Missouri Pacific and the Western Pacific, neither of which is in any manner interested in northwestern Colorado.

In this connection we direct the Court's attention to the statement of the lower court,

> "Realizing that much of this controversy had already been decided by the Commission in the previous Cut-Off proceedings, the Examiner was firm in holding the examination to the single ultimate question of public interest involved in the proposed stock purchase and control of one railrad by the other" (R. 129).

This statement of itself convicts the Examiner of proceeding directly contrary to the decisions of this Court. In B. & O. R. R. v. United States, *supra*, at page 263, this Court says:

> "Facts conceivably known to the Commission, but not put in evidence, will not support an order."

In United States v. Abilene & Southern R. Co., 265 U. S. 274 (68 Law. Ed. 1016), this Court says:

> "The objection to the use of the data contained in the annual reports is not lack of authenticity or untrustworthiness. It is that the carriers were left without notice of the evidence with which they were, in fact, confronted, as later disclosed by the finding made. The requirement that, in an adversary proceeding specific reference be made, is essential to the preservation of the substantial rights of the parties.
>
> "The right of the carriers to insist that the consideration of matter not in evidence invalidates the order was not lost by their submission of the case without argument, and by their acquiescing in the suggestion that the presentation of a tentative report by the Examiner be omitted. While the course pursued denied to the Commission the benefit of that full presentation of the contentions of the parties which is often essential to the exercise of sound judgment, it cannot be construed as a waiver by the carriers of their legal rights. The general notice that the Commission would rely upon the voluminous annual reports is tantamount to giving no notice whatsoever. The matter improperly treated as evidence may have

been an important factor in the conclusions reached by the Commission. The order must, therefore, be held void" (289-290).

In Interstate Commerce Commmission v. Louisville & N. R. R. Co., 227 U. S. 88 (57 Law. Ed. 431), this Court said:

> "On the appeal here, the government insisted that while the act of 1887 to regulate commerce (24 Stat. at L. 379, Sections 14-16, chap. 104, U. S. Comp. Stat. Supp. 1911, p. 1284) made the orders of the Commission only prima facie correct, a different result followed from the provision in the Hepburn Act of 1906 (34 Stat. at L. 584, Sec. 4, Chap. 3591, U. S. Comp. Stat. Sup. 1911, p. 1297) that rates should be set aside if after a hearing the 'Commission shall be of the opinion that the charge was unreasonable.' In such case it insisted that the order based on such opinion is conclusive, and (though Interstate Commerce Commission v. Union P. R. Co., 222 U. S. 547, 56 L. Ed. 311, 32 Sup. Ct. Rep. 108, was to the contrary) could not be set aside, even if the finding was wholly without substantial evidence to support it.
>
> "1. But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had the power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, *quasi* judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence'" **(91)**.

If, therefore, the theory of the Examiner was, as indicated by the lower court, that all of the evidence which we proposed to offer was before the Commission in other cases, and that the Commission could draw on its knowledge thus gained, then clearly the hearing violated the law as laid down by this Court in the cases above referred to.

In this connection it is also material to again direct the Court's attention to the fact that in the Dotsero Cut-Off hearing these appellants were not represented for the reason that they were not disposed to object to the Moffat Road building the Cut-Off, but when it is proposed that the Rio Grande should build the Cut-Off, the situation is entirely changed. There has been no hearing upon the question of the public interest in the building of the Cut-Off by the Rio Grande.

It is only fair to the Commission to assume that it decided this matter upon the record as made at the hearing without reference to the matters contained in the other cases which had been presented to it. Therefore it decided this case without any information upon the matters which were excluded from the hearing. If such be the case, we submit that there has not been that full hearing of the public interests involved in this case as is required by the statute.

D.

That if Material Evidence Was Excluded When Offered by Other Interests, Appellants Were Not Required to Re-Offer the Same Evidence in Order to Complain of Its Rejection.

The lower court states in its opinion:

> "An analysis of the hearings indicates that *some* of the matters excluded were not offered in evidence by plaintiffs' counsel but by counsel representing other

> interveners of which we think plaintiffs cannot avail themselves in this suit. These were matters for the others to complain about" (R. 129).

These appellants were practically the last interests to present evidence at the hearings, consequently before they proceeded with their testimony the Examiner had clearly outlined his position as to what testimony he would not admit. For example, the record shows that Mr. Rogers, appearing for the Denver Chamber of Commerce, was attempting to go into the history leading up to the construction of the Moffat Tunnel and its bearing on the proposed extension westward from Craig to connection with Utah points, and the Examiner was excluding all testimony bearing upon that history. Thereupon the following took place:

> "Examiner Davis: The basis you may ask but I do not care to go into the history.
>
> "Mr. Vogl: Mr. Examiner, may the record here show that we save an exception?
>
> "Examiner Davis: It is unnecessary but you can show it" (R. 79).

At the opening of the hearing, the Examiner stated:

> "Now, in taking testimony, testimony in its general nature which is merely cumulative will not be taken. Now, that rule will be strictly enforced, and you will govern yourselves accordingly" (R. 63).

During the examination and cross-examination of various witnesses by Mr. Rogers, the Examiner very definitely showed what character of testimony he would exclude as being immaterial. Thereupon counsel for these appellants stated:

> "Mr. Examiner, in order to avoid having to repeat, may the record show on behalf of the Moffat Tunnel League and the Uintah Basin Railroad League that we want the same testimony upon this further point: that one of the matters to be considered in this matter is the future operations of the Tunnel, and the finances of the Tunnel Commission at this time will have a bearing on whether or not we are to be

further taxed for the support of the Tunnel, and therefore it is material in that issue.

"Examiner Davis: I will let the record show that you request that but it will be the same ruling" (R. 83).

Certainly it would have cumbered the record unnecessarily after the Examiner had excluded testimony when offered by Mr. Rogers, if we had gone through the process of again offering the same testimony through other witnesses. This Court appreciates that hearings before the Interstate Commerce Commission are more or less informal, and once a certain line of testimony has been excluded we submit that it was not necessary for these appellants to re-offer the same testimony. However, it will be noticed that most of the exclusion of which we are here complaining was of testimony offered by these appellants.

We submit that due regard for orderly proceeding required that when the Examiner had clearly ruled upon the admissibility of a certain class of testimony, that ruling applied to all parties, and all parties could complain of it, if the ruling was wrong.

MISCELLANEOUS.

Before closing this brief it may be in order to refer briefly to some incidental matters which have been referred to in the record in this case.

We have pointed out that one of the grounds upon which the Commission found that granting of the application was in the public interest, is that it harmonizes with the Commission's consolidation plan. This suggests the propriety of a brief outline of the history leading up to the alignment of the Moffat Road in that consolidation plan.

In Professor Ripley's report to the Interstate Commerce Commission on Consolidation of Railroads, under Section 5, Paragraph 4 of the Interstate Commerce Act, which report is attached to the Tentative Plan of the Commission on Consolidation of Railroads, reported in 63 I. C. C. 455, concerning the Denver & Salt Lake Road, Professor Ripley says the following:

"The Colorado situation must be examined in detail. * * * * The bulwark of the Rocky Mountains behind Denver is bound to be overcome before long by the construction of a penetrating direct line toward Salt Lake City. The need of such provision of a through route is imperative, not only for the upbuilding of Denver, but for the satisfaction of national commercial needs. It is not alone that the roundabout twist by way of Pueblo is a waste of distance. The route through by Pueblo, by reason of physical obstacles of grade and curvature, can never be brought to first-class transcontinental standards. It is probably in order to supply this need that the Denver & Salt Lake City project has been so persistent, in the face of seemingly insuperable obstacles. Its location as a short cut west of Denver is shown by a distinctive designation on map 16. The original project for a through line to Salt Lake City follows the river course out through the northwestern corner of Colorado. But it is said to be feasible, by a short and not difficult piece of construction, to leave the Denver & Salt Lake at McCoy, by the dotted line on the map and to reach the Denver & Rio Grande at Dotsero, Colo. Thus the most difficult portions of the Denver & Rio Grande line are avoided. The heavy grades at Tennessee Pass and Palmer Lake would be eliminated. By a short construction of 40 miles, the roundabout route by way of Pueblo would be reduced by 175 miles. The remainder of the Denver & Rio Grande on to Salt Lake City is almost all water grade and could readily be fitted to carry the Burlington load of traffic.

"But the Denver & Salt Lake Railroad itself is a formidable project, especially where it cuts through the continental divide by the proposed James Peak tunnel. At present its grades and curvatures are prohibitive. In 1913 the Denver tunnel commission estimated a cost of $4,420,000 and a necessary period of possibly five years. The city of Denver authorized $3,000,000 of bonds, but the Colorado supreme court in 1914 declared the authorization to be illegal. Since

that time nothing has been accomplished, although a referendum vote in 1920 rejected the project as municipal enterprise by a narrow margin. It seems quite possible that with strong financial support, and the promised traffic which could be guaranteed by a great system, a combination of public and private enterprise might bring the project to a fruition. Thus might the great investment in an admirable new trunk line west of Denver to a junction at Salt Lake City with the Western Pacific be made available as a national asset" (591-2).

The Commission in its tentative plan did not include the Moffat Road with any of the proposed systems, nor did it include the Rio Grande with the Missouri Pacific, but made it a part of the Santa Fe system.

In the Commission's final plan of consolidation, 159 I. C. C. 522, The Moffat Road is included as part of System No. 18, the Missouri Pacific System, which includes the Rio Grande. This opinion was the first notice to the public that the Commission was considering lining the Moffat Road with the Rio Grande. Thus it appears that there has never been afforded to the interested public an opportunity of considering or giving to the Commission its views on the propriety of including the Moffat Road with the Rio Grande.

The lower court seemed to attach some importance to a contrast of the official character of some of the interveners in this case, such as the Tunnel Commission, The Public Utilities Commission of the State of Colorado, with the character of the appellants' organizations. This case presents legal issues and the official standing of the various parties seems to us to be immaterial. However, since the lower court referred to that matter, we refer this Court to Chap. 64, Session Laws of Utah, 1931, in which the Utah State Legislature appropriated money "for the use of Uintah Basin Railroad League", showing the official standing of that League, and the testimony of Witness Johnson (then a State Senator, and now Governor of the State), that the County Commissioners of Grand, Routt and Moffat Counties had requested the Moffat Tunnel League to represent them in this proceeding.

Probably it will be suggested that the provision in the Commission's order that the Rio Grande will, through the Moffat Road,

> "Establish such through routes in connection with any western connection hereafter constructed under our authority as we may find in a subsequent proceeding or proceedings to be reasonable and in the public interest" (R. 29-30),

is a sufficient protection to these appellants. In view of the decision of this Court in U. S. v. Missouri Pacific Ry. (Subiaco Case), 278 U. S. 269 (73 Law. Ed. 322), this provision is by no means sufficient to protect anyone contemplating building such extension. A contrast of this condition with that made by the Commission in Clinchfield Railway Lease, 90 I. C. C. 113 (133-4), affirmed Atlantic Coast Line R. Co. v. U. S., 284 U. S. 288 (76 Law. Ed. 298), emphasizes this point. The provision in the Clinchfield case was:

> "4. The applicants shall permit the line of the Clinchfield and its subsidiaries to be used as a link for through traffic, via existing gateways of interchange, *or via such gateways as may hereafter be established under authority of the commission by means of the connecting lines which the Louisville & Nashville Railroad Company proposes to build, equally available to such other carriers, now connecting, or which may hereafter connect, with the line of the Clinchfield and its subsidiaries, as may desire to participate in through routes and joint rates between points in territory north and west of the line of the Clinchfield* and points at and beyond the Ohio River on the one hand and points in the southeastern and Carolina territory on the other, under divisions to be agreed upon by the applicants, or either of them, and/or the Clinchfield organization, on the one hand, and by the other participating carrier or carriers on the other, and shall not discriminate as to rates, fares, and charges against such participating carrier or carriers as compared with the applicants, or either of them; the intention of this provision being that the line of the Clinchfield and its subsidiaries shall

> be maintained as an open route equally available to all carriers connecting with the Clinchfield for traffic between the points designated."

This Court held that the Commission could require a carrier, as a condition to authority to lease the line of another carrier, to surrender its right to insist upon its "long haul" under Section 15(4) of the Interstate Commerce Act. That is what the Commission did require in the Clinchfield case (*supra*), but the provision in this case, which reads,

> "establish such through routes in connection with any western connection hereafter constructed under our authority as we may find in a subsequent proceeding or proceedings to be reasonable and in the public interest" (R. 29-30).

falls far short of any such requirement. It is quite apparent that if the Rio Grande controls the Moffat Road it will insist upon its rights under said Section 15(4) and under such conditions no independent interests will build an extension between Craig and Salt Lake City.

CONCLUSION.

For the reasons hereinbefore urged, we respectfully submit that the decision of the lower court should be reversed and the order and decision of the Commission should be enjoined.

Respectfully submitted,

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Texas & Pacific Railway Co. v. *Int. Com. Comm.*, 162 U. S. 197 — 30

United Mine Workers v. *Coronado Co.*, 259 U. S. 344 — 11, 15

United States v. *Abiline & Southern Ry. Co.*, 265 U. S. 274 — 14, 30

United States v. *Baltimore & Ohio etc. Ry.*, 226 U. S. 14 — 31

Statutes:

Interstate Commerce Act (41 Stat. 48, U. S. Code, Title 49, Sec. 5):

Section 5 (2) — 27, 38

Section 5 (3) — 38

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 499

THE MOFFAT TUNNEL LEAGUE, A VOLUNTARY ASSOCIATION, and Uintah Basin Railroad League, a Voluntary Association, appellants

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Denver & Rio Grande Western Railroad Company, et al., appellees

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS

The opinion of the District Court (R. 121) is reported in 59 F. (2d) 760. The report of the Interstate Commerce Commission, hereinafter called the Commission, made in connection with the order or certificate which appellants sought to have set aside (R. 15) is reported in *Denver & Salt Lake Ry.*

Co. Control, 170 I. C. C. 4. The reports and orders of the Commission authorizing the construction of the Dotsero cut-off from which the last-named proceeding arose, are reported in *Proposed Construction by Denver & Salt Lake Western Railroad Company,* 154 I. C. C. 51, 175 I. C. C. 535. (R. 143–162.)

JURISDICTION

The suit was commenced October 14, 1931, under the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 219, U. S. C. Title 28, Sec. 47) to enjoin, set aside, and annul the Commission's certificate of public interest, authorizing the Denver & Rio Grande Western Railroad Company (hereinafter called the Rio Grande) to acquire stock control of the Denver & Salt Lake Railway Company (hereinafter called the Moffat). (R. 3.) On July 17, 1932, the final decree of the court was entered denying appellants' motion for temporary injunction and dismissing the bill of complaint upon the merits. (R. 131.)

On July 18, 1932, this appeal was duly allowed by said District Court. (R. 133.) Jurisdiction is conferred on this Court by the Urgent Deficiencies Act of October 22, 1913.

QUESTIONS PRESENTED

1. Whether appellants, being unincorporated voluntary associations acting in their own names without any natural person or corporate entity

appearing as a party plaintiff, have the capacity to maintain this suit.

2. Whether appellants, who purport to represent citizens and residents of localities which may be indirectly affected by the possible results of one railroad company holding stock control over another, have the necessary legal interest and standing to maintain suit under the Urgent Deficiencies Act to set aside the Commission's order authorizing such acquisition.

3. Whether because the Commission rejected certain evidence as irrelevant, its order was made without a "hearing" as required by the statute.

STATUTES INVOLVED

The statutes considered material to the determination of the questions involved in this case will be found in the Appendix (Infra, p. 38).

STATEMENT

This is a suit to set aside an order of the Commission made pursuant to paragraph (2) of Section 5 of the Interstate Commerce Act (See Appendix, Infra, p. 38) approving and authorizing the acquisition by the Rio Grande of the control of the Moffat by stock ownership. The said application is closely connected with other proceedings involving railroad development in the vicinity, and they will therefore be included in this statement along with a description of the railroads of the locality.

The Moffat railroad extends westward from Utah Junction, Colo. (Denver), through the Moffat Tunnel to its western terminus at Craig, Colo., a distance of 232 miles. Its original promoters hoped to build on across central and western Colorado to Provo or Salt Lake City, Utah, but after going through receivership and reorganization the property was in 1926 acquired by new interests which have no present intention of extending the line to the west beyond Craig. (See Denver & Salt Lake Reorganization, 117 I. C. C. 397.)

The Moffat Tunnel was constructed under authority of the State of Colorado by the Moffat Tunnel Commission of the Moffat Tunnel Improvement District (a taxing district including all the area that the appellant Moffat Tunnel League purports to represent). At a cost in excess of $15,200,000 railway and water tunnels, side by side, were driven through the mountains. The railway tunnel was leased to the Moffat, which began operating through it in February, 1928.

In 1925 the Salt Lake & Denver Railroad Company, sponsored by the Bamberger interests of Salt Lake City, applied to the Commission, under Section 1 (18) of the Interstate Commerce Act, for a certificate of public convenience and necessity authorizing the building of a line from Craig through the Uintah Basin to Provo, Utah. (*Proposed Construction by Salt Lake & Denver R. R.*, Finance Docket 4713.) The Moffat did not appear in op-

position. A Commission examiner, after extensive hearings, submitted a proposed report which recognized the need of a railroad through the country between Craig and Provo, but pointed out that the record did not contain evidence of sufficient financial support for the proposed line, and recommended that the Commission deny the application without prejudice. (R. 102–4.) Formal exceptions were filed by the applicant and by several interveners who favored the construction of the road, but no exceptor has as yet moved to have the proposed report and exceptions submitted to the Commission for final determination. Technically, the case is still pending before the Commission upon the proposed report and the exceptions, but practically the project may fairly be considered as abandoned. Apparently no other interests have since seriously contemplated the extension of the Moffat line westward from Craig.

The line of the Rio Grande begins at Denver and runs southward through Pueblo, and thence westwardly, by a route made devious by the mountainous country traversed, to Provo and Salt Lake City, Utah. Dotsero, 343 miles from Denver by the circuitous Rio Grande route, is 41.3 miles from Orestod, Colo., a point on the Moffat only about 130 miles from Denver via the Moffat. In April, 1929, the Commission issued a certificate authorizing the Moffat, through a subsidiary to build a connection (called the Dotsero cut-off) between the

existing Moffat line and the Rio Grande (see *Proposed Construction by Denver & Salt Lake Western Railroad Company,* Finance Docket No. 4555, 154 I. C. C. 51). At the hearing in the proceeding, which involved the granting of certificate of convenience and necessity for the Dotsero cut-off, the application was opposed by the Bamberger interests, which, as shown above, had made and, in effect, abandoned an application for a certificate to build westward from Craig. Opposition was also presented by certain interests in Utah which were desirous of a railroad westward from Craig through the Uintah Basin and thought that the building of the Dotsero cut-off would prejudice that project. The Rio Grande intervened in the proceeding and favored the application, provided that it be permitted to operate its trains over the cut-off and over the Moffat line between Orestod and Denver. The Commission found that the construction was justified upon the condition asked by the Rio Grande. The railroads concerned were directed to negotiate the contracts for the joint use and trackage rights above outlined, the Commission reserving the right to settle the terms thereof in event of failure to agree.

On February 1, 1930, the Rio Grande, having secured an option upon certain shares of the Moffat's common stock which, together with shares previously acquired, would aggregate 57.94 per cent of the total outstanding stock of the Moffat, applied

to the Commission for authority to acquire control of the Moffat by the ownership of a majority of its stock. The two voluntary associations, which are appellants here, intervened in opposition to the application. The State of Colorado, Colorado Public Utilities Commission, The Moffat Tunnel Improvement District, official bodies, the Moffat Tunnel Taxpayers Association, Denver Real Estate Exchange, and numerous other voluntary citizen's associations intervened to demand that the Commission impose conditions looking to the just and equitable treatment of the district west of Craig, the building of the Dotsero cut-off and the establishment of joint rates over a connection that might thereafter be built between Craig and Utah points.

On December 2, 1930, the Commission rendered its report reciting its order in the Dotsero Cut-off case (154 I. C. C. 51) and its instructions to the Moffat and the Rio Grande to draft and submit contracts under which the Rio Grande should have trackage rights over the new track and the Moffat line into Denver. The inability of the companies to come to an agreement relative to trackage rights, the consequent delay in the issuance of the certificate in the construction case and the beginning of work upon the much-needed Dotsero cut-off is stated. The Commission found that the control in question would be in accord with its general consolidation plan, that it would facilitate the early construction of the Dotsero cut-off, and hence that the

acquisition by the Rio Grande of control of the Moffat by purchase of its capital stock would be in the public interest, provided: (1) That the Rio Grande would purchase for cash, at a price not exceeding $155 a share, all shares of the Moffat which might be offered to it within a specified time; (2) that it would join in such through routes over any railroad thereafter constructed through the Uintah Valley between Craig and Utah points as the Commission might in subsequent proceedings find to be reasonable and in the public interest, and (3) that it would commence, or cause to be commenced, the construction of the Dotsero cut-off within six months after the date of the order and would proceed to the completion of such construction within a specified time. (170 I. C. C. 4, R. 18–34.) These conditions constitute substantial compliance with the suggestions made by the interveners in the proceedings.

In July, 1931, the Rio Grande having executed a written acceptance of all the conditions above outlined, the *Construction case,* No. 4555, and the *Control case,* No. 8070, were both called to the attention of the Commission and on September 15, 1931, the Commission issued supplemental reports in each of said proceedings. (175 I. C. C. 535, R. 13; 175 I. C. C. 542, R. 154.) The Commission by formal order authorized the Rio Grande to acquire control of the Moffat (R. 15), and in the *Construction case,* by supplemental order authorized the construction

as prayed by the Moffat subsidiary, Denver & Salt Lake Western Railroad Company. (170 I. C. C. 4, R. 18; 175 I. C. C. 542, R. 13.) The above-mentioned order in No. 8070, the *Control case,* is the order attacked in this suit.

The appellants in their complaint in the case at bar say they are two "unincorporated voluntary associations" organized respectively to promote the commercial interests and development of adequate railroad facilities for the counties of Moffat, Route, and Grande in Colorado, and Uintah and Duchesne in Utah, alleging that the area of all the counties named is known collectively as the Uintah Basin. They had intervened at the hearing before the Commission and opposed the granting of the application. The complaint in this case named no individuals as members or officers of the alleged organizations and the testimony before the Commission was likewise indefinite upon that point.

The Court was asked by appellants to set aside the Commission's order upon these two grounds: First, that the order of the Commission is entirely unsupported by the evidence and is therefore illegal, null, and void (paragraph VIII of the complaint), and, second, that the Commission held no "hearings" as required by the Act, by reason of the fact that the examiner excluded from the record certain evidence offered at the "purported hearings" of the case (paragraph VI of the complaint).

(The appellants, on appeal, have abandoned the first ground of objection to the order.)

All interveners before the Commission, except the appellants, seem to have been satisfied that the conditions imposed afforded them the protection desired, since none save the appellants appear as plaintiffs in this suit to set aside the order with its conditions; and the State of Colorado, Colorado Public Utilities Commission, Moffat Tunnel Improvement District, and the Moffat Tunnel Commission intervened before the lower court in support of the Commission's order.

The United States, the Commission, and the interveners defended upon the grounds (1) that the plaintiffs, being unincorporated voluntary associations and naming no individual as their sponsor, could not bring suit in a Federal court; (2) that they had no standing to institute the action under the Urgent Deficiencies Act; (3) that there was a hearing before the Commission as required by law, and (4) that there was in the record substantial evidence to sustain the Commission's order. (R. 37–59.) The only evidence before the Court was a duly certified copy of the record, including the evidence, in the stock-control proceeding before the Commission and the reports and orders of the Commission in the Dotsero Construction case. (R. 37–59.) The three-judge court sustained the defendants and interveners on all points. (R. 120–131.) It held that though by statute voluntary unincorporated associations were authorized to intervene before the Commission, such organizations

lacked the capacity to sue in the Federal courts; further, that aside from this legal infirmity, plaintiffs had not shown such an interest or right in the subject matter of the Commission's order or any injury to any right or interest such as would give them standing to originate and prosecute the suit; that the requirements of the statute as to hearings before the Commission had been complied with and that there was substantial evidence in the record to sustain the order. Wherefore the Court dismissed the suit and plaintiffs have perfected their appeal to this Court.

SUMMARY OF ARGUMENT

I. Neither of the two appellants has the capacity to bring and maintain this suit. They are unincorporated voluntary associations. Neither has legal entity or identification either as a corporation or natural person. No natural person claiming to be a member of either association joined in bringing the suit. Hence, the complaint discloses no capacity whatever in appellants to bring this suit, for "only natural persons or corporations may sue or be sued by their respective names in the national courts." *Beavers* v. *McMillan et al.*, 44 F. (2d) 668 (U. S. D. C. N. D. Tex.); *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, 385; *Great Southern Fireproof Hotel Co.* v. *Jones*, 177 U. S. 449, 455; *Chapman* v. *Barney*, 129 U. S. 677, 682.

Nor can it be contended that this is a "class suit," for again the necessary natural person repre-

senting the class does not appear as a party plaintiff. On the contrary, appellants bring this suit solely in the names of their unincorporated associations. See *Milheim et al.* v. *Moffat Tunnel Improvement District et al.*, 262 U. S. 710. Again, appellants' lack of capacity to sue may not be supplied upon the theory that they are within the excepted class of unincorporated associations within the purview of this Court's decision in *United Mine Workers* v. *Coronado Coal Co., supra.*

II. Appellants have not shown that any independent legal right of their own is violated or affected by the Commission's order, hence, they have no standing to maintain this suit. *Pittsburgh & West Va. Ry.* v. *United States,* 281 U. S. 479; *Sprunt* v. *United States,* 281 U. S. 249. Their only real interest is the construction of a railroad through the counties of Colorado and Utah in which their members reside. The only injury claimed by them is their fear that control of the Moffat by the Rio Grande may lessen the anticipated possibility of such construction in the future. Thus, appellants' alleged interest in the order is insufficient to enable them to maintain this suit, and the threatened injury alleged is indirect and too remote to entitle them to equitable relief.

Nor does the fact that appellants were permitted to intervene before the Commission supply their lack of right or standing to maintain this suit. This Court held in *Pittsburgh & West Va. Ry.* v.

United States, supra, at page 486, that "the mere fact that the appellant was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order in the absence of resulting actual or threatened legal injury to it," citing *Sprunt & Son* v. *United States, supra.* Appellants' position is unlike that of complainants in the *Chicago Junction Case,* 264 U. S. 258, who, by express provision of section 3 of the Act entitling them to equality of treatment from other carriers, had sufficient legal interest through declaration of statutory right, to maintain their suit.

III. The hearing accorded by the Commission adequately satisfied all rights of appellants. The contention that the hearing was inadequate is based upon the Commission's refusal to admit certain testimony, most of which was offered by parties other than appellants. As to this, the District Court was right in holding that it was a matter of which appellants could not complain. Moreover, the proffered testimony was essentially cumulative, the Commission already having similar evidence before it in the same record. Further, the testimony offered was irrelevant, for it was based on appellants' desire to have the Moffat road extend its line westward from Craig and the need of that community for transportation services, and was speculative in that it would disclose merely the fear of appellants that the possibility of construction of

the desired extension would be more remote if the Rio Grande were permitted to acquire control of the Moffat. The issue before the Commission was whether that control was in the public interest, and not whether the Moffat road should be extended westward. Even if the latter had been an issue in that proceeding, rejection of the proffered evidence would not have violated appellants' constitutional rights to a hearing, for the Commission was without authority to require the extension to be constructed. *Interstate Commerce Commission* v. *Oregon-Washington, etc., Company*, No. 23, October Term, 1932, decided January 9, 1933. Finally, the mere fact that the Commission rejected some testimony does not render the order void, if there was sufficient evidence before it to justify the action taken. *Spiller* v. *Atchison, etc., Ry. Co.*, 253 U. S. 117, 126; Cf. *United States* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274.

ARGUMENT

I

Appellants are two unincorporated associations; they are not legal entities and hence lack the capacity to bring and prosecute this action

(1) The two appellants are neither natural persons nor corporations. The complaint alleges that they are "unincorporated voluntary associations" and contains no information as to the identity of the members thereof. The legal capacity of the plaintiffs to bring the suit is denied by all

defendants and interveners. The evidence before the Commission contains the name of no individual as being represented by either of the associations; nor is it alleged that residents (as a class) of the Colorado and Utah counties mentioned have designated the plaintiffs as their representatives.

The plaintiff associations, we submit, come under the rule stated in *United Mine Workers* v. *Coronado Co.*, 259 U. S. 344, wherein this Court, in considering the liability of the United Mine Workers of America, an unincorporated labor union, to suit in its association name, said (p. 385):

> Undoubtedly at common law an unincorporated association of persons was not recognized as having any other character than a partnership in whatever was done, and it could only sue or be sued in the names of its members, and their liability had to be enforced against each member. *Pickett* v. *Walsh*, 192 Mass. 572; *Karges Furniture Co.* v. *Amalgamated Woodworkers Local Union*, 165 Ind. 421; *Baskins* v. *United Mine Workers of America*, 234 S. W. 464.

It is true that in the case above cited this Court held that a suit in equity would lie *against* the unincorporated labor union, but the opinion (pp. 385–392) indicates that the Court considered that labor unions constituted an excepted class of unincorporated voluntary associations in connection with liability to suit in the association name. This because of the commonly accepted recognition of

such organizations as legal entities in numerous enactments by both national and state legislative bodies and of the almost exclusive dominance of such organizations within the realm of labor matters. A careful reading of the considerations which moved this Court to hold that the United Mine Workers of America was a legal entity and subject to be sued under that name for damages resulting from its action, will indicate that such considerations can not be attributed to the unincorporated associations which have attempted to bring the instant suit. They undoubtedly come within the rule stated in *Beavers* v. *McMillan et al.*, 44 F. (2d) 668 (N. D. Tex.), where the Court said:

> Only natural persons or corporations may sue or be sued by their respective names in the national courts. If an unincorporated association or society seeks entry it can only do so by and through its members, who must be brought into the record by positive averment.

See also *Brown* v. *Protestant Episcopal Church*, 8 F. (2d) 149, 150 (E. D. La.). Such an unincorporated association is not a legal entity so that it may in law be deemed to be the citizen of a particular state. See *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S. 449, 455.

In *Chapman* v. *Barney*, 129 U. S. 677, 682, this Court held that an express company, alleged to be a joint stock company organized under the law of the State of New York, could not be a *citizen* of

that state within the meaning of the statutes regulating jurisdiction.

Since no individual nor legally incorporated association of individuals appears as plaintiff, we submit that under the authorities cited, the plaintiffs have shown no capacity to institute and prosecute this suit.

(2) Nor can it be contended that the suit is what is known as a class suit. Such a suit is thus described in Foster's Federal Practice, Section 114 (p. 701):

> Where a number of persons have a common interest in a thing which is the subject of litigation * * * *one or more* may sue or be sued on behalf of the rest.

Equity Rule 38 is as follows:

> When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.

The textbook above quoted from, further states:

> A class suit can not be maintained unless the persons interested are numerous. Such bills were dismissed when so far as appeared there were only two in one class and in another class three persons entitled to the relief sought. *The bill must show the names and residences of the persons interested who are omitted so far as they are known to the complainant.* (Foster's Federal Practice, Sec. 15, p. 705.) (Italics ours.)

A typical class suit was before this Court in *Milheim et al.* v. *Moffat Tunnel Improvement District et al.*, 262 U. S. 710, where a designated individual, Milheim, together with other named individuals, brought suit on behalf of themselves and other landowners in the Moffat Tunnel Improvement District, attacking the validity of certain special tax assessments. The procedure in the case cited is, we submit, very different from that followed in the case at bar where the action is instituted and prosecuted by mere names without any natural person or legal entity appearing.

In view of the fact that the Court has before it the name of *not a single individual* as the representative of the class on whose behalf this suit purports to have been brought, it is clear that the suit can not be maintained under the "class rule."

II

The position of appellants with respect to the Commission's order is such that they have no standing to invoke equitable relief

In addition to appellants' incapacity to bring this suit, we submit that they have no standing with respect to the order involved which would entitle them to have it set aside by a court of equity. To maintain a suit against an order of the Commission, a complainant must show that but for the intervention of a court of equity, an independent legal right of his own will be violated by the order. *Pitts-*

burgh & West Va. Ry. v. *United States,* 281 U. S. 479.

Even assuming that the unincorporated associations now before this Court might in this suit legally represent certain residents and property owners in the territory described in the complaint, there is no contention that the commission's order will subject such residents and property owners to *any special injury or damage.* The injury feared by appellants is an indirect harm which they anticipate may result from the Commission's order to every citizen and property owner. Such property owners' interest is clearly insufficient to give them the necessary standing independently to institute suit to annul the order. This point is emphasized by the fact that the State of Colorado, the Moffat Tunnel Improvement District, all the members of the Moffat Tunnel Commission organized under authority of the State of Colorado, the Colorado Public Service Commission, which bodies, as this Court said in *Int. Com. Comm.* v. *Oregon-Washington etc. Co.,* —U. S. —, N. 23, decided January 9, 1933, officially represent the interest of their localities in obtaining adequate transportation service, have intervened as defendants in this case *supporting the order.*

In *Sprunt* v. *United States,* 281 U. S. 249, the Court, after referring to the fact that participation in a proceeding before the Commission did not of itself confer upon a party the right to bring an

original suit to set aside the order of the Commission, said (pp. 255–256):

> * * * Such a suit can be brought by a shipper only where a right of his own is alleged to have been violated by the order. And his independent right to relief is no greater where by intervention or otherwise he has become a party to the proceeding before the Commission or to a suit brought by a carrier.
>
> In the case at bar the appellants have no independent right which is violated by the order to cease and desist. They are entitled as shippers only to reasonable service at reasonable rates and without unjust discrimination. If such service and rates are accorded them, they can not complain of the rate or practice enjoyed by their competitors or of the retraction of a competitive advantage to which they are not otherwise entitled. The advantage which the appellants enjoyed under the former tariff was merely an incident of, and hence dependent upon, the right, if any, of the carriers to maintain that tariff in force and their continuing desire to do so. * * * Since the appellants' economic advantage as shippers was an incident of the supposed right exercised by the carriers, the appellants can not complain after the carriers are satisfied or prefer not to press their right, if any.

Appellants base their complaint solely upon the need of a railroad westward from Craig, but it is not contended that they have any legal right to

require of any one the construction of such extension. *Int. Com. Comm.* v. *Oregon-Washington, etc., supra.* Any advantage which they may have in the Dotsero cut-off not being constructed, or not being controlled by the Rio Grande when constructed, is obviously dependent upon the mere *possibility* of some person or company building a line through the Uintah Valley. Nor can the appellants be said to have established in a legal sense that the Rio Grande's acquisition of control over the Moffat would weaken the possibility of the westward extension from Craig. Moreover the Commission has made it a condition of the acquisition of control that the Rio Grande shall be a party to joint rates over any extension west from Craig and the Rio Grande has formally accepted the condition. Hence the new situation affords a greater *chance* for a railroad through the Uintah Basin to Utah because now *any* interest may build with assurance of through route and rate participation, whereas originally only the Moffat could build with that certainty.

We submit that the conclusion of the lower court on this point is correct, as stated in its opinion. (R. 128.)

> * * * We therefore find that the plaintiffs, being voluntary, unincorporated associations, can not as such maintain this suit; that, aside from this legal infirmity, these associations have not shown such an interest or right in the Commission's order

or proved a threat of an injury resulting from its enforcement that would authorize them to maintain this action; and, finally, that this legal disqualification is not cured or aided by the statute (28 U. S. C. A., Sec. 45a), in that it does not give them a right to institute this action solely because of their position as intervenors in the proceedings before the Commission. * * *

III

The fact that the appellants were permitted to intervene in the proceeding before the Commission would not of itself confer upon unincorporated associations, nor upon persons only indirectly affected by the Commission's order, the power or right to bring suit to annul the order

In their brief the appellants say that they have the necessary capacity to maintain the instant suit because they were permitted by statute to appear in the Commission proceeding. They cite Section 45a, Title 28, U. S. C. A.; Section 212, Commerce Court Act, 36 Stat. 539, 1167; but they cite no decision in which the question of the capacity of an unincorporated association to bring suit in a Federal court has been determined. All the cases cited involved the question whether the legal rights of the plaintiffs in these cases would be so affected by the Commission's order, as to enable them to maintain the suits. At the opening of their argument upon this point, the appellants assert that "parties" having the "necessary" interest in the subject matter are not barred from instituting and

maintaining a suit to set aside an order of the Commission merely because they are unincorporated associations. But no authority is cited as to whether an unincorporated association is a "party" in a legal sense or what interest in the subject matter is "necessary."

The appellants rely on the *Chicago Junction Case* (*Baltimore & Ohio R. Co.* v. *United States*), 264 U. S. 258, in which there was no question as to the identity or legal entity of the plaintiffs. The real question was whether the plaintiffs had a sufficient legal interest in the subject matter of the Commission's order necessary to enable them to maintain the suit to set it aside. It is true that in the course of the opinion the Court uses language which the appellants in the present case construe as holding that any individual or group of individuals, or any incorporated or unincorporated association which has properly been permitted to appear before the Commission in a proceeding, can maintain a suit under Urgent Deficiencies Act to set aside the order issued in such proceeding. But the holding of this Court was that the Baltimore & Ohio, a railroad which had formerly made use of the terminal roads over which the New York Central was permitted to acquire control, was entitled to maintain the suit to set aside the order because it had a right by statute to equality of use and treatment with respect to the connecting roads, which legal right might be jeopardized by the control authorized.

The Court said, in speaking of the prospective loss of revenues to the Baltimore & Ohio (p. 267):

> This loss is not the incident of more effective competition. * * * It is injury inflicted by denying to the plaintiffs equality of treatment. To such treatment carriers are, under the Interstate Commerce Act, as fully entitled as any shipper.

That the Baltimore & Ohio could maintain the suit, not because it had appeared before the Commission in the proceeding which resulted in the order attacked, but because this Court considered it to have a substantive legal right to equality of treatment by the terminal lines, is borne out by the language used by Mr. Justice Sutherland in his dissenting opinion (concurred in by Mr. Justice McReynolds and Mr. Justice Sanford) where it is stated (p. 273):

> The decision of the court here proceeds upon the theory that the injury complained of *is a denial of equality of treatment in the use of the terminals; but I do not understand this to be the gravamen of the bill.* The complaint is of inequality of opportunity to get business—not of opportunity to use the terminals. * * * (Italics ours.)

In subsequent cases this Court has very clearly corrected any erroneous conclusion which might be drawn from its language in the *Chicago Junction Case, supra.* In *Sprunt & Son* v. *United States, supra,* this Court, in considering the standing of a

shipper to bring a suit to set aside an order of the Commission which directed the elimination of a rate differential and thereby deprived the plaintiffs of an advantage over other competitors, said (pp. 254, 255):

> * * * The employment of this advantage gave them a distinct interest in the proceeding before the Commission under Section 3 of the Interstate Commerce Act. For their competitive advantage was threatened. Having this interest, they were entitled to intervene in that administrative proceeding. And if they did so, they became entitled under Section 212 of the Judicial Code to intervene, as of right in any suit "wherein is involved the validity" of the order entered by the Commission. But that interest alone did not give them the right to maintain an independent suit, to vacate and set aside the order. * * * And his independent right to relief is no greater where by intervention or otherwise he has become a party to the proceeding before the Commission or to a suit brought by a carrier.

In *Pittsburgh & West Va. Ry.* v. *United States,* supra, the Court said (p. 486):

> The District Court held that the appellant was entitled to bring this suit under the Urgent Deficiencies Act to set aside the order, because it had intervened in the proceedings before the Commission, and because it is a connecting carrier and a minor-

> ity stockholder of the Wheeling. The court erred in so holding. The mere fact that appellant was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order in the absence of resulting actual or threatened legal injury to it, *Alexander Sprunt & Son* v. *United States, ante,* p. 249.

The two cases above cited show very clearly that participation in Commission proceedings does not of itself establish the right of a party to maintain a suit under Urgent Deficiencies Act to set aside a Commission order.

Appellants, being neither natural nor artificial persons, and having no legal interest in the subject matter of the Commission's order, and being affected thereby only as members of the community in general, have neither capacity nor standing to maintain this suit.

IV

The Commission's hearing which resulted in the order attacked by appellants fully complies with the requirements of the statute

The appellants contend that the Commission failed to hold a hearing as required by Section 5 (2) of the Interstate Commerce Act because the examiner excluded as immaterial and irrelevant certain testimony which had no bearing upon the question whether the control of the Moffat by the

Rio Grande would be in the public interest. The language of the statute is—

> Whenever the Commission is of opinion, after hearing, * * * that the acquisition, * * * by one of such carriers of the control of any other such carrier or carriers * * * will be in the public interest, the Commission shall have authority * * * to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises.

In their complaint (par. VI, R. 6) the appellants set out thirteen specifications of testimony which they say was offered and excluded by the Commission examiner, the action of the examiner being subsequently approved and adopted by the Commission. Such testimony, according to the appellants, would have tended to prove—

(1) That the Moffat was originally planned to extend westward from Craig and that this fact was generally known and discussed, numerous settlers being induced to locate in the Uintah Basin because the Moffat, Government agents and commercial bodies held out prospects of the extension, and that such settlers have since left and give as their reason for so doing the continued lack of railroad facilities.

(2) Statistics as to the natural and industrial resources, and the population of the Uintah Basin,

and the opinions based thereon that the area needs railroad facilities.

(3) That the purpose of the Moffat Tunnel was to aid the extension of the Moffat west from Craig, as well as the existing Moffat line to Craig, and the Dotsero cut-off; that the Moffat Tunnel District in assessing benefits for the purpose of taxation to pay the cost of the tunnel considered the likelihood of the extension westward from Craig; that the possibility of such extension as a part of a new through route was stressed in campaigns, which resulted in enactment of legislation under which the Tunnel District has been organized and the tunnel constructed; that the inhabitants of the present Tunnel District voted for the construction and "the people in the territory which would be benefited by the acquiring of the Moffat Railroad by the Rio Grande consistently voted against it"; that the people of the District would not have consented to taxing themselves to pay for the tunnel if the hope of a westward extension had not been held out to them.

(4) The details of the cost, the need for, the traffic effects, and the public necessity of the Dotsero cut-off.

(5) Surmises that the Rio Grande by its control of the Moffat would divert traffic from and ruin the Moffat financially, and that it would destroy the coal-mining industry along the line of the Moffat, since it was in competition with coal industry along the line of the Rio Grande.

(6) That the Rio Grande has at all times been opposed to the extension of the Moffat westward from Craig.

It is well established that in proceedings before the Interstate Commerce Commission the mere admission of specific testimony, which, under the strict rules of evidence such as are applied in court proceedings, should have been excluded, will not invalidate an order of the Commission. Conversely the exclusion of evidence which might of itself have been admissible will not warrant a court in setting aside an order of the Commission if it conforms with the law, is supported by substantial evidence, and it appears that the hearing resulted in a substantial presentation of the material facts involved. A large degree of latitude is allowed the Commission in its investigations. This Court said in *Spiller* v. *Atchison, etc., Ry. Co.*, 253 U. S. 117, 126:

> These provisions [sections 13, 16 and 17 of the Interstate Commerce Act] allow a large degree of latitude in the investigation of claims for reparation, and the resulting findings and order of the Commission may not be rejected as evidence because of any errors in its procedure not amounting to a denial of the right to a fair hearing, so long as the essential facts found are based upon substantial evidence.

While the above paragraph referred to investigation by the Commission of claims for reparation, the investigation of applications for certificates of

public interest would obviously involve at least as large, if not a larger, degree of latitude. See also *United States* v. *Abilene & S. Ry. Co.*, 265 U. S. 274; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25. The Court does not review a proceeding before the Commission as upon appeal or writ of error. Its scope is not so extensive. (*Spiller* v. *Atchison, etc. Ry. Co., supra.*)

Hence, we submit the appellants here must demonstrate not merely the technical competence and relevancy of the evidence offered, but further that without the evidence excluded there could be no trustworthy determination of the question whether the acquisition of control involved was in the public interest. It must be a failure on the part of the Commission to give consideration to an essential element of the subject matter involved, not merely the exclusion or ignoring of particular evidence, in order to warrant the setting aside of the Commission's order. (Compare *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 205, 207.)

Most of the substantive facts which the excluded testimony tended to prove were already before the Commission; that the extension of the Moffat westward from Craig was planned, hoped for, expected and advertised was an accepted fact; that it was hoped that the tunnel would result in this and other needed railroad construction west of the Continental Divide was never questioned. The plan by which the tunnel was financed and its approxi-

mate cost appear in Commission reports introduced in evidence. The question of the public convenience and necessity of the Dotsero cut-off had already been fully heard by the Commission and the substance of the evidence presented in that proceeding was embodied in Commission reports put into the record in the instant case. This Court has said in *United States* v. *Baltimore & Ohio, etc., Ry.*, 226 U. S. 14, 20, that the Commission may in one proceeding take notice of the results reached by it in other cases, "when its doing so is made to appear in the record and the facts thus noticed are specified so that the matters of law are saved." See also *Georgia Comm.* v. *United States*, 283 U. S. 765, 770.

That the Commission gave consideration to the essential facts which would arise from the testimony rejected is evidenced by the dissenting report of Commissioner Eastman (R. 34), wherein he sets out and approves the position taken by the appellants before the Commission and recites the facts which the appellants say they wanted to prove by the rejected testimony.

In addition to testimony merely reiterating facts already established and thus not material to the determination of the issues involved in the Section 5 (2) proceedings, the Commission excluded testimony which on its face would have amounted only to guesses and apprehensions that the Rio Grande would commit deliberate "*sabotage*" of the Moffat, its business and financial interest, regardless of the heavy investment which the Rio Grande would then

have in the very property damaged. Such improbable speculations which would leave out of consideration the protection which the courts and the Commission could give against such a corporate crime fully justified, we submit, the Commission's refusal to permit such unnecessary burdening of its record.

Not only were the basic facts already before the Commission, but much of the testimony offered was irrelevant to the issues involved.

Even though the Moffat was originally planned to extend westward beyond Craig, there is nowhere to be found any indication that it has at any recent time desired to undertake such construction. The Moffat did not oppose the application which the Bamberger made to the Commission in Finance Docket No. 4713, *Proposed Construction by Salt Lake & Denver Railroad Company,* in 1925, wherein entirely different interests sought permission to construct a line exactly like the Craig extension which the appellants allege to have been a part of the original Moffat plan.

The rejected evidence described in paragraph (1) above would, according to appellants, raise an implied obligation on the part of the Moffat, the Government, and/or commercial organizations to construct the Craig extension because of inducing representations to settlers. Clearly the existence of such an obligation could have no bearing upon

the proper determination of the question of control pending before the Commission.

That the tunnel was constructed at public expense and taxes levied upon the basis of an *expectation* that *someone might* build the Craig extension (see paragraph (3) above) could have no bearing upon the propriety of the Commission's approval of the Rio Grande control application, neither would evidence as to the details of the resources of the Uintah Basin. Let it be admitted that the conditions in the Basin were such that a railroad would be a public convenience and necessity—this would not mean that the construction of the Dotsero cut-off should not be expedited and assured. Undoubtedly both constructions are desirable from a local standpoint, but a builder has appeared for only one—the public need for the other is no reason that the one shall not be built.

Evidence bearing upon the public interest in the Dotsero cut-off (referred to in paragraph (5) above) and its financing was before the Commission in Finance Docket No. 4555, which involved the public convenience and necessity of the construction of the cut-off. (R. 143–161.) Practically all the interests which participated in No. 8070 were represented before the Commission in No. 4555, and after a long hearing the Commission authorized the construction with conditions which it imposed at the instance of the protestants. No

attack has been made by court proceeding provided for by statute, upon the Commission's order in the cut-off case. Additional evidence bearing upon the propriety of the Dotsero cut-off would have unnecessarily encumbered the record in the later proceeding and involved details already threshed out regarding an issue already decided.

Evidence of opposition by the Rio Grande to the Craig extension (referred to in paragraph (6) above) could have been offered only upon the theory that with the Moffat under Rio Grande control, the Moffat would never build the Uintah extension. But no probability has been shown that *without Rio Grande control* the Moffat would ever build the extension.

Finally, the appellants say that evidence referred to in paragraph (6) above was excluded to the effect that the control of the Moffat by the Rio Grande would enable the latter to wreck the former financially. The Commission's report indicates that the Commission had before it and considered the financial status of the two companies and the relationships that would arise from the control proposed. Appellants in their petition do not allege that any new basic facts were to be offered in evidence, but apparently wished to submit some deductions or arguments upon the subject.

Little of the evidence, the rejection of which the appellants complain of, was offered by the appel-

lants in this case. The testimony was offered by other parties who now make no objection to the Commission's action in the instant case. They offered the testimony to show the desirability of the Commission attaching conditions to the granting of the Rio Grande's application, and in practically every instance the Commission attached the condition suggested. In short, the appellants' whole case seems to be based upon the proposition that since the Uintah Valley needs a railroad, the Dotsero cut-off should not be encouraged; that though no one is willing to build the Craig extension, no other construction elsewhere, although badly needed, should be permitted if it might by some chance reduce the probability that some one might at some future time build the Uintah extension.

The opinion of the lower court, thus disposed of the question of whether appellants were afforded a fair hearing before the Commission (R. 129):

> * * * An analysis of the hearing indicates that some of the matters excluded were not offered in evidence by plaintiffs' counsel but by counsel representing other intervenors of which we think the plaintiffs can not avail themselves in this suit. These were matters for the others to complain about. This they have not done. On the contrary, they are here in support of the order of the Commission. Some of the matters that the intervenor-plaintiffs desired to introduce

were not pertinent to the precise issue then involved. Moreover, they had nothing tangible on which to base objections to the stock acquisition. Neither the plaintiffs nor any one else had a plan to do what all (with the probable exception of the Rio Grande) desired, namely: the extension of the Moffat Road west from Craig to the Uintah Basin. Nor was there any evidence of a likelihood of any plan being made until traffic conditions should inspire one.

Further the court said (p. 765, R. 130):

> * * * So it appears that the exclusion of evidence was not prejudicial to any rights which the plaintiffs claimed but was only disturbing to their hope that some how, some time, in some way the Moffat Road would be projected from Craig westwardly. Yet under the Commission's order the realization of that hope is preserved, for it expressly leaves open the way westward and makes it just as possible to extend the road with the order in force as to extend it with the order annulled. * * * all that the present order does adversely to the plaintiffs, on their own showing, is to disturb their hope of an early extension of the Moffat Road westward. * * *

CONCLUSION

We respectfully submit that the decree of the District Court dismissing the complaint should be affirmed.

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Of counsel.

FEBRUARY, 1933.

APPENDIX

The following paragraphs of the Interstate Commerce Act as amended (41 Stat. 48, U. S. Code, Tit. 49, Sec. 5) are pertinent to this case:

Section 5 (2):

> Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or propety subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises.

Section 5 (3):

> The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1) or (2), as it may deem necessary or appropriate.

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CHARLES ELMOR

Supreme Court of the United States

October Term, 1932

No. 499

THE MOFFAT TUNNEL LEAGUE and UINTAH BASIN RAILROAD LEAGUE, VOLUNTARY ASSOCIATIONS, *Appellants,*

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, ET AL., *Appellees.*

BRIEF

FOR

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
THE DENVER AND SALT LAKE RAILWAY COMPANY,
THE MOFFAT TUNNEL IMPROVEMENT DISTRICT AND THE MOFFAT TUNNEL COMMISSION.

Appeal from the District Court of the United States for the District of Delaware.

HENRY McALLISTER,
Denver, Colorado,
Solicitor for The Denver and Rio Grande Western Railroad Company, Defendant-Appellee.

ELMER L. BROCK,
Denver, Colorado,
Solicitor for The Denver and Salt Lake Railway Company, Intervener-Appellee.

ERSKINE R. MYER,
Denver, Colorado,
Solicitor for The Moffat Tunnel Improvement District and Moffat Tunnel Commission, Intervener-Appellees.

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Supreme Court of the United States

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No. 499

THE MOFFAT TUNNEL LEAGUE and UINTAH BASIN RAILROAD LEAGUE, VOLUNTARY ASSOCIATIONS, *Appellants,*

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, ET AL., *Appellees.*

BRIEF

FOR

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, THE DENVER AND SALT LAKE RAILWAY COMPANY, THE MOFFAT TUNNEL IMPROVEMENT DISTRICT AND THE MOFFAT TUNNEL COMMISSION.

Appeal from the District Court of the United States for the District of Delaware.

I.

STATEMENT OF THE CASE.

This brief is filed in behalf of The Denver and Rio Grande Western Railroad Company (herein called the Rio Grande), defendant-appellee, The Denver and Salt Lake Railway Company (herein called the Salt Lake Company*),

* In the Commission's Report (R. 18), its Order (R. 13) and the opinion of the District Court (R. 121), the Salt Lake is referred to as the "Moffat Road." It will be understood that these terms refer to the same company.

The Moffat Tunnel Improvement District and the Moffat Tunnel Commission, intervener-appellees.

The small map attached to this brief shows with approximate accuracy the railroads and other features involved in this controversy, and largely conforms to the map attached to the bill of complaint (R. 12A).

1. Historical and explanatory statement.

A proper understanding of the matters in controversy requires a statement concerning the Rio Grande and Salt Lake Companies and events which preceded the application to the Interstate Commerce Commission (herein called the Commission) resulting in its order challenged herein. The Commission's report dated December 2, 1930, in its Finance Docket 8070, preceding the order herein attacked and on which it was based (170 I. C. C. 4, R. 18), and the opinion of the District Court (R. 121) contain very clear statements of historical and physical facts but a brief presentation thereof will, we believe, serve further to clarify the case.

(a) *The Rio Grande.*

Construction of this railroad began about 1871 and its present system was substantially completed prior to 1890.

Its main line of railroad extends southerly about 120 miles to Pueblo and thence westerly to Salt Lake City and Ogden, a total distance of 782 miles. It rises from an altitude of 4668 feet at Pueblo to 10,240 feet at Tennessee Pass, Colorado, the crest of the Continental Divide, and then descends to 4583 feet at Grand Junction in Western Colorado, and to 4293 feet at Ogden, Utah. Its station of Dotsero is west of the divide and about 343 miles from Denver on the present route, elevation 6167 feet. The Rio

Grande has many branch lines both standard and narrow gauge, in Colorado and Utah, the narrow gauge lines especially having been constructed to serve metalliferous mining camps now exhausted.

Since 1924, the control of the Rio Grande has been in the Missouri Pacific Railroad Company, having a connection at Pueblo, and the Western Pacific Railroad Corporation, whose wholly owned subsidiary, the Western Pacific Railroad Company, owns and operates a line of railroad extending from a connection with the Rio Grande at Salt Lake City, to San Francisco, and other points in northern California (*D. & R. G. W. Application,* 70 I. C. C. 102; *D. & R. G. W. Reorganization,* 82 I. C. C. 745, 752, 90 I. C. C. 141; *Missouri Pacific Application,* 90 I. C. C. 161; *D. & S. L. Ry. Co. Control,* I. C. C. Finance Docket 8070, 170 I. C. C. 4, 5, Exhibit C to Bill of Complaint herein, R. 19).

But while the Rio Grande is controlled directly or indirectly by these companies and constitutes for them a valuable connection, its through or interchange business is not confined to them. At Denver it connects and interchanges with the Burlington, the Rock Island, the Union Pacific, and the Colorado and Southern; at Colorado Springs, with the Rock Island; and at Pueblo, with the Santa Fe and the Colorado and Southern, as well as the Missouri Pacific. At its western termini it connects with the Union Pacific System lines (in addition to the Western Pacific) at Salt Lake City, and with the Southern Pacific and Union Pacific Systems at Ogden.

The Rio Grande is therefore an important link in through traffic between all eastern points (especially through the gateways of Chicago and St. Louis) and the Pacific Coast. But as a glance at the map will show, it is handicapped in competition for traffic to or from the West, originating at, destined to or passing through the Denver

gateway, by its circuitous route through Pueblo, and also, to some extent, by the heavy grades required in surmounting the Continental Divide.

(b) *The Salt Lake Company (the Moffat).*

The railroad of this company extends from Denver westerly to Craig, Colorado, a distance of 232 miles, and was constructed between the years 1903 and 1913 (See, *D. & S. L. Valuation,* 119 I. C. C. 483, 493; See, R. 67). The design of its founder, David H. Moffat, of Denver (the line being commonly called the "Moffat Road"), was to build to Salt Lake City or Ogden, but these plans became impossible, Mr. Moffat died, the railroad went through two reorganizations *(D. & S. L. Valuation,* 119 I. C. C. 483, 493; *D. & S. L. Reorganization,* 117 I. C. C. 397), and as we shall show later, the Salt Lake Company (under its independent management) has no plans for an extension westerly from Craig (R. 98). The Salt Lake as originally constructed, also was compelled to cross the Continental Divide, rising from 5170 feet at Denver to 11,660 feet at Corona (65.47 miles), descending to 6700 feet at Orestod, and 6175 feet at Craig (*Freeman et al. v. A., T. & S. F.,* 73 I. C. C. 178, 183).

(c) *The Moffat Tunnel Improvement District and the Moffat Tunnel.*

The heavy grades upon the Salt Lake in crossing the divide and the severe snows and other adverse weather conditions encountered there rendered operations of the Salt Lake extremely difficult and expensive. (See, *Freeman et al. v. A., T. & S. F.,* 73 I. C. C. 178, 183.) Its abandonment was threatened, and its continued operation was deemed of great economic importance by the people of Denver and the northwestern part of the state which it traverses, especially as it was hoped that through either an extension westerly from Craig to Utah common points,

or (what was more important, because more feasible) the building of the Dotsero Cut-off, presently to be mentioned, the Salt Lake would be strengthened by becoming a part of a through transportation line to the advantage of its tributary territory and the population thereof (See, *Milheim v. Moffat Tunnel Impt. Dist.*, 262 U. S. 710, 718). It was believed that a necessary step to this end was the construction of a tunnel, through James Peak (of the divide) about six miles in length at an altitude of about 9100 feet, and eliminating about 2500 feet of rise. Accordingly, after other efforts had failed, the Colorado General Assembly of 1922 enacted the "Moffat Tunnel Act" (Colo. S. L. 1922, p. 88; R. 63), which, in brief, created the Moffat Tunnel Improvement District, consisting of all of the City of Denver, and parts or all of counties traversed by the Salt Lake. The boundaries of this district are shown with approximate accuracy upon the appended map. This act provided for the construction of the tunnel, as a transportation facility for various purposes, including railroads, power transmission, telephone and telegraph lines and water; the cost thereof to be met by issue of bonds, and, if necessary, special assessments upon the real estate in the district according to benefits to be determined by the Moffat Tunnel Commission provided for by the act and which was vested with the duty of constructing the tunnel; and the leasing of the tunnel, or the several uses thereof, to railroads or others. The validity of this act was upheld by the Colorado Supreme Court and by this court *(Milheim v. Moffat Tunnel Dist.*, 72 Colo. 268, 262 U. S. 710). It was constructed at a cost of about $15,470,000.00 (R. 78). In January, 1926, an agreement of lease of all the *railroad* uses of the tunnel was entered into between the District and its Commission and the Salt Lake Company, for a long period of years (R. 79). The validity of this lease was challenged in litigation begun in January, 1929, but

in all important respects, was upheld by the Circuit Court of Appeals of the Tenth Circuit in November, 1930 (*Moffat Tunnel Improvement District v. D. & S. L. R. Co.*, 45 Fed. (2) 715; certiorari denied, 283 U. S. 837). The Salt Lake Company went into possession under the lease in February, 1928 (R. 79), and the tunnel has since been used as a part of its line. This operation through the tunnel has not only reduced the grade by about 2500 feet, but has shortened the line about 23 miles, (See, *Milheim v. Moffat Tunnel Dist.*, 262 U. S. 710, 718).

In the construction of the main, or railroad tunnel, the District constructed another tunnel (called the water tunnel) immediately adjoining and parallel, the objects thereof being (a) to create a conduit for transportation of water from the western slope of the Continental Divide, to the eastern slope, including Denver, and (b) to expedite construction of the railroad tunnel through various headings from the water tunnel. In fixing the rental to be paid by the Salt Lake Company, the Tunnel Commission apportioned two-thirds of the then estimated cost to the railroad tunnel and one-third to the water tunnel (R. 80).

Pursuant to the Moffat Tunnel Act, the Commission assessed the benefits against all of the real estate in the District (upon which any special assessments are based) at about $45,000,000.00, this amount being approximately 15% of the assessed value of such property; and approximately 89% of these benefits is upon property in the City of Denver, and only 1½% thereof is upon property in Moffat County (R. 78, 80). The comparatively small percentage of benefits outside of Denver is due to the fact that this portion of the District is in mountainous and comparatively sparsely settled country with but few small towns or communities. There are about 80,000 taxpayers in the District, of whom about 70,000 are in Denver (R. 78).

(d) *The "extension" westerly from Craig.*

So much is said regarding this "proposed" extension, that the true facts should be clearly stated, as demonstration that it is a mere dream.

As already indicated, the original hope or purpose of the old Salt Lake Company at the time of the inception of this railroad in 1903, was to build to Salt Lake City. But these plans did not mature.

The present plaintiffs-appellants called as a witness at the Commission's hearing in the proceeding herein involved Mr. Gerald Hughes, Chairman of the Salt Lake Company's board, who had no connection with the Rio Grande. Their purpose was to show that the Rio Grande had, in its negotiations with the Salt Lake, attempted to frustrate an extension of the Salt Lake westerly from Craig. In this they completely failed (R. 98-99). Furthermore, the witness testified that the Salt Lake Company had made no plans for such extension; and that it had not tried to arrange the financing of such extension (R. 98). He stated that at times some directors of the Salt Lake, acting individually and not for it, especially Mr. Alexander Berger (presently to be mentioned in connection with the Salt Lake and Denver—the Bamberger) had taken some interest in it, but he (Berger) had "now sold out" (R. 98). He testified further (R. 99):

> "Q. And it has always been part of the plan of the Denver & Salt Lake enterprise to carry on an extension west to Utah points, if practicable, hasn't it?
>
> "A. Well, I couldn't say that, Mr. Rogers.
>
> "Q. What are the facts in regard to it?
>
> "A. I think the railroad has always hoped for an extension if the business would justify it, and of late years I think a great many in the road

have felt that it could only be justified through some arrangements with the connecting lines on the east and west to favor it with through business.

"Q. Until recently, Mr. Hughes, it is true that the D. & R. G. W. interests have been hostile to an extension west from Craig?

* * * * *

"A. No, the only—speaking of recent years, Mr. Rogers, you might say since the reorganization of the present Salt Lake Road and the reorganization of the Rio Grande, in which my conferences have been largely those referred to by Mr. Vogl in the matter of an arrangement for the construction of the Dotsero Cut-Off, and in that matter I stated it fully when the subject came up. I am not sure but what I volunteered it by stating our position just as I have, and the representatives of the Rio Grande have always stated that they never asked it. I think they stated more, that if they did the Interstate Commerce Commission would not permit it."

The only other "scheme" for the construction of a line through the Uintah Basin to connect with the Salt Lake at Craig, was that of the Salt Lake and Denver Railroad Company, which we shall call the "Bamberger," the name of its principal protagonist. Testimony regarding it was given by Julian M. Bamberger (R. 101), who had intervened in behalf of his company. Unlike the anonymous plaintiffs, Mr. Bamberger did not unqualifiedly oppose the granting of the Rio Grande's application to acquire stock control of the Salt Lake. But he asked that a remarkable condition be attached to the Commission's order, to the effect that if and when the Bamberger or any other line was constructed, it be granted trackage rights over the entire Salt Lake road from Craig to Denver, a distance of 232 miles (R. 77, 108), although he conceded that his

nebulous and supposititious road was not in a position to make a trackage contract (R. 108).

The facts respecting the Bamberger are briefly these: It was a Utah community enterprise and subscriptions were limited to $1,000 each, and somewhere between $35,000 and $50,000 were paid in, prior to or in 1925 (R. 103, 106). In 1925, it applied to the Commission, under paragraph (18) of Section 1 of the Interstate Commerce act, for a certificate of convenience and necessity to build a railroad from Provo, Utah (a point on the Rio Grande about 44 miles south of Salt Lake City) to Craig, *a distance of 297 miles* (R. 102, 106-107). This became I. C. C. Finance Docket 4713. In the summer of 1925, a full hearing, lasting for two or three days, occurred, and in January, 1926, the Commission's examiner filed a report adverse to the granting of the certificate. In July, 1926, the Bamberger filed exceptions to this proposed report, but never pressed them (R. 106). In the hearing, on its application, the Bamberger requested that the Commission should definitely put itself on record against the building of the Dotsero Cut-off, because the local business in the Uintah Basin would not support his railroad, and the construction of the cut-off would divert from the Bamberger a great amount of bridge or through traffic (which it expected to take from the Rio Grande) (R. 107). He testified that at such hearing, Mr. Alexander Berger, who was then a director of the Salt Lake Company but was acting independently of it and then associated with Bamberger, qualified this position regarding the cut-off, but still insisted that its construction would constitute a "serious hindrance" to financing the Bamberger (R. 107). Thereafter Berger sold all of his Salt Lake Company stock (R. 107), and apparently lost all further interest in the Bamberger, thus depriving it of its only possible visible means of support.

A reading of the Bamberger testimony (R. 101-108) will indicate that the witness had no substantial hope that his railroad could or would be built. "We are not certain that we can finance our railroad. We have allowed our application to rest for four years" (R. 108). A notable circumstance connected with the Bamberger application is that it was promoted entirely independent of the Salt Lake (which did not even appear at its hearing) and without any agreement for the establishment of a through route with it (R. 107).

Concluding the discussion of the Bamberger and in order that this court may be advised of the present situation, we deem it proper to say that since the hearing of this case in the District Court, and under date of October 7, 1932, the Commission entered an order dismissing the Bamberger's application. It has not protested that action or asked for a reopening or rehearing of its application.

The record herein shows, by evidence offered not only by witness Bamberger, but by a witness for the present plaintiffs-appellants, that the Rio Grande opposed the Bamberger application at the hearing thereon (R. 109). The latter read into the record an extract from the Rio Grande's brief, which (supplemented by further extracts elicited on his cross examination) read (R. 109-110):

> "We (the Rio Grande) say this because it is evident that the people living in the Uintah Basin, whether in and around the so-called Vernal Country, or in Western Moffat County, Colorado, if the limits of the Basin be extended to include that area, would be benefited by the construction of applicant's railroad. That they need further transportation facilities is undoubted. That the business which they, or their sections, would contribute to this proposed railroad would justify the enormous expenditure involved, is another and far different

question, which we are satisfied must be answered in the negative. That such construction would not only greatly impair the ability of the Denver and Rio Grande Western Railroad adequately to serve the public, but would add another weak, strug gling and impecunious unit to the railroad map of the Rocky Mountain section of the country, is, we believe, manifest from a candid and conservative review of the record in this case.

* * * * *

"The Denver and Rio Grande Western Railroad Company realizes that its interests cannot be allowed to stand in the way of a necessary and economically sound railroad enterprise which will not depend for its possible financial success upon the ruin of established systems of transportation, the prevention of their improvement, and damage to communities and industries which have arisen along their course and which they serve. But the record in this case, both by direct statement of applicant's witnesses and by necessary inference from the facts, shows that applicant proposes to live upon the traffic it takes from the Denver (Rio Grande). Without it the Bamberger line would not exist even on paper, and the application would not have been presented. Even including this traffic a fair review of the evidence and revision of the estimates respecting the cost of the projected railroad and its probable earnings must lead to the conclusion that it will not be self-sustaining, that it must fail financially, and that with such failure it will at least impair the ability of the Denver (Rio Grande) to fulfill its obligations to the public."

Those statements made over seven years ago correctly presented the position of the Rio Grande. Startling

developments during the years since elapsed require one modification, and that is that if anyone could be found willing to pour perhaps $15,000,000 into the construction of these 297 miles of railroad, he would probably be greeted with friendly hands but welcomed to an hospitable grave of his hopes, by those who would continue their transportation (if any) by trucks, buses and the private automobile.

But without resorting to briefs in other cases, the Rio Grande's attitude toward the "extension" was thus stated by its principal witness Williams at the hearing now in question (R. 70):

> "The witness was asked what would be the applicant's attitude toward the construction of a western extension from Craig, to connect with Utah or other western points 'so as to take through traffic over the Denver & Salt Lake into Denver without reference to the D. & R. G. W.' The witness answered, 'It is purely a question of what the traffic will sustain.' It would be unfair toward the stockholders and the public for us to construct mileage which would not sustain itself, because otherwise it becomes a tax on the traffic which you are already moving. Unless you have some reasonable hope of developing rapidly enough to sustain that line I think you would wait until there was more traffic in sight. Asked whether he meant that he would not consider the construction of a route west until there was business to legitimately sustain it, the witness said, 'I cannot say at the moment, I haven't had to face that but I would (fol. 299) not expect a plan to be submitted unless there was some reasonable expectation that the expenditures would earn some reasonable return.' The general tendency of freight rates now is downward, and the general tendency of wages upward;

> new competition such as the motor bus and airplane is facing us and we have to fight for our existence. 'At the present time, in the territory here, we are not earning on the increased investment an amount equal to the carrying charge; if we finance all those improvements with bonds, we have to use some surplus earnings. It is quite evident, under those conditions, that we couldn't look forward to the building of much mileage that would not sustain itself.' "

And again he said, in cross examination by appellant's attorney, that "we will build any time when the traffic will justify it—any time, anywhere" (R. 73).

(e) *The Dotsero Cut-off—I. C. C. Finance Docket 4555.*

But while construction of a 297-mile extension of the Salt Lake from Craig proved impracticable, except in the minds and hopes of certain residents in the territory which it would serve who never intended to hazard a cent in the enterprise, nevertheless there was an obvious and feasible means of strengthening the Salt Lake, assuring its continued existence and benefiting the territory it served, and was a part of the original plan of Mr. Moffat. This was through the construction of the Dotsero Cut-off. It will be observed from the map that while the railroads of the Rio Grande and the Salt Lake are by no means parallel, at one point they approach each other, and it was practicable to construct a railroad only about 41 miles in length, down the Colorado (Grand) River from Orestod, a station on the Salt Lake west of the Moffat Tunnel and about 129 miles from Denver, to Dotsero, on the Rio Grande, west of the Continental Divide. This would reduce the railroad mileage from Denver to Dotsero about one-half or 173 miles, and shorten the distance, via the Rio Grande, from Denver to Ogden, from 782 miles to

609 miles. Furthermore the grade of the cut-off would be slight (the altitude of Orestod being 6700 feet and that of Dotsero, 6167 feet) and this new route would eliminate the heavy Rio Grande grades over Tennessee Pass (10240 feet).

Plaintiffs-appellants have sought in this proceeding to minimize the cut-off as a factor in the minds of the people, in the creation of the Moffat Tunnel Improvement District and in the construction of the Moffat Tunnel. Undoubtedly it was hoped by some that through some financial legerdemain the Salt Lake might be extended or another railroad constructed as a western connection. But the prospect for this was negligible, and from the very beginning the Dotsero Cut-off presented a far better possibility. In 1919, when it appeared that the Salt Lake might be "scrapped," the Colorado legislature passed an act, contemplating the construction of the tunnel, the condemnation of the Salt Lake, the extension to the western boundary of the state and for the construction of a line from "McCoy to a junction with the Denver and Rio Grande Railroad at Dotsero." (Colo. S. L. 1919, pp. 669, 672). Nothing was done under this act and it was repealed at the next session (Colo. S. L. 1921, p. 744). Then came the Moffat Tunnel Act of 1922 above mentioned (*supra*, p. 5), and in upholding its constitutionality this court, in *Milheim v. Moffat Tunnel District*, 262 U. S. 710, while saying nothing regarding a western extension as one of the public purposes to be subserved, did say (p. 720):

> "And the evidence strongly indicates that the tunnel may and will be used, to like advantage, by the Denver & Rio Grande Railroad, extending from Denver to Salt Lake City, with a great shortening and improvement of its line."

This necessarily referred to a Rio Grande user through the Dotsero Cut-off, as it could reach the tunnel in no other way.

These legislative and judicial references indicate that the Dotsero Cut-off has been in the minds of the people throughout all tunnel discussion and action. Of course, a paramount purpose of the tunnel act was to save the Salt Lake, as it furnished the only railroad service to a large section of the state (see 262 U. S. on 718), but next in importance *from a feasible standpoint* was its strengthening through the construction of the Cut-off. That this is true may be confirmed by stating that in the present proceeding before the Commission, the Moffat Tunnel Commission (the official board of the District), the Denver Chamber of Commerce, the Denver Real Estate Exchange, the State of Colorado, and others, intervened and while not opposing the Rio Grande's control of the Salt Lake, *insisted as a condition thereto,* that the Dotsero Cut-off be promptly constructed, and the Colorado Public Utilities Commission made that recommendation (R. 19). It was because of this chorus of demand, that a condition to that effect was incorporated in the order under attack herein.

The prospective construction and Rio Grande user of the cut-off had not only been a public expectation, but it was a factor in the Rio Grande's reorganization of 1924, resulting in equal ownership by the Missouri Pacific and the Western Pacific. In the plan for that reorganization it was stated (R. 136, 64):

> "that the policy to be pursued by the Board of Directors of the New Company (Rio Grande) shall be * * * (2) to encourage the creation of a short line from Denver to Salt Lake City by the utilization of the existing line from Salt Lake City to Dotsero, and a line from the latter point through the proposed Moffat Tunnel to Denver";

and this was referred to by the Commission in its approval of the reorganization (*D. & R. G. W. Reorganization,* 82 I. C. C. 745, 752).

I. C. C. Finance Docket 4555. In 1924, The Denver and Salt Lake Western Railroad Company (herein called the Salt Lake Western), a wholly owned subsidiary of the Salt Lake (whose predecessor was then in receivership), applied to the Commission, under paragraph (18) of Section 1 of the Interstate Commerce Act, for a certificate of public convenience and necessity to build the Dotsero Cut-off. It became known as Finance Docket 4555, and will sometimes be referred to as the Dotsero Cut-off case. Owing to the existing Salt Lake receivership and the fact that Salt Lake operations through the tunnel did not commence until February, 1928, the hearing was delayed. It occurred in September, 1928. As indicated in the Commission's report therein (Ex. I, R. 143, 154 I. C. C. 51), the Rio Grande, the Bamberger, the Moffat Tunnel Improvement District and its Commission, the Public Utilities Commissions of Colorado and Utah, the Denver Chamber of Commerce, the Salt Lake City Chamber of Commerce and various other organizations in Colorado and the Uintah Basin of Utah, intervened. *The present appellants did not appear.*

As evidenced by the Commission's subsequent report (R. 144-148), the Rio Grande's position was this: It recognized that the cut-off could be a useful link in a through transportation route, but it contended that if it were constructed by or under the Salt Lake, and operated by that company, so as to interchange with the Rio Grande at Dotsero, the result would be serious and might be disastrous to the latter, as it would be short-hauled on through business and also on business on its line in western Colorado which it had built up through many years of effort and solicitation. Obviously the greater part of this business through the Denver gateway would pass over the new route rather than over the Rio Grande's more circuitous line through Pueblo. The Rio Grande did not oppose the application providing a condition was attached

to the granting thereof requiring the Salt Lake to grant to it, on reasonable terms, trackage rights over the cut-off and the Salt Lake's own line from Orestod (the eastern terminus of the cut-off) to Denver (Utah Junction). Much testimony was presented on these questions, and the Colorado Public Utilities Commission recommended to the Commission that the application be granted subject to the condition requested by the Rio Grande (R. 144, 154 I. C. C. on 52). On April 15, 1929, the Commission promulgated its report and order found in the record herein as Exhibit I (R. 143; 154 I. C. C. 51), practically in line with the Rio Grande's position. After reviewing the facts it said (R. 148):

> "While the terms of the operating agreement are uncertain, and although the figures shown in the foregoing list are also necessarily approximate in other respects, it is manifest that the interest of the carriers as a whole would best be served under an arrangement whereby the Rio Grande could operate on fair and equitable terms over the cut-off and the Moffat line between Dotsero and Utah Junction. The evidence is conclusive that the cut-off would be of distinct advantage as a transportation facility and that the public interest requires its construction for operation in the manner just stated. If operated by the applicant under active traffic opposition from the Rio Grande, the result would certainly mean financial loss to the Rio Grande and possibly to the Moffat line road as well.
>
> * * * * *
>
> Upon the facts presented we find that the present and future public convenience and necessity require the construction of the line of railroad proposed by the applicant, upon condition that the Rio Grande be permitted to operate over said line and over the Moffat road between Orestod and Utah

Junction, Colo., on fair and reasonable terms to be approved by us,"

An order was entered requiring the Rio Grande, within 30 days thereafter, to file with the Commission and serve on the Salt Lake and the Salt Lake Western, copies of agreements with them setting forth the terms and conditions which the Rio Grande was willing to accept as governing the operations over the Dotsero Cut-off and the Salt Lake's Denver-Orestod line; that unless the Salt Lake and Salt Lake Western executed said agreements (subject to the Commission's approval), they should file with the Commission and serve on the Rio Grande, within thirty days after filing of the Rio Grande's proposal, copies of agreements setting forth the terms and conditions desired by them (R. 149-150). The Commission's authority to impose the conditions was found in paragraph (20) of Section 1 of the Interstate Commerce Act providing that it might attach to its certificates "such terms and conditions as in its judgment the public convenience and necessity may require." (U. S. C. Title 49, Sec. 1 (20).)

The Rio Grande complied with the requirement and filed its proposed agreements in May, 1929, but by that time litigation had arisen between the Salt Lake Company and the Moffat Tunnel Commission over the validity of the tunnel lease, which was not terminated until the opinion of the court of appeals in November, 1930, and denial of certiorari in April, 1931 (*Moffat Tunnel Impt. Dist. v. D. & S. L. Ry. Co.*, 45 Fed. (2) 715, 283 U. S. 837). Therefore, the Salt Lake was not in a position to consider such agreements, and it secured a number of extensions of time from the Commission (See Exhibit C, R. 20, 25; 170 I. C. C. 6, 11).

The matter was in that situation when the Rio Grande made its application to Commission for control of the Salt Lake, which we next discuss, deferring for the moment consideration of subsequent proceedings in this Dotsero Cut-off case.

2. The Rio Grande's control of the Salt Lake—I. C. C. Finance Docket 8070.

(a) *The application and circumstances attending it.*

On December 9, 1929, the Commission promulgated its plan for the consolidation of railway properties, under which both the Rio Grande and the Salt Lake were included in System 18, based on the Missouri Pacific Railroad Company (*Consolidation of Railroads,* 159 I. C. C. 522, 544). In a separate opinion therein, one Commissioner expressed a view that the Rio Grande and Western Pacific might be combined into a system independent of the Missouri Pacific, saying (p. 567) that the "use of the Moffat Tunnel will enable this route to compete on better terms with that of the Union Pacific," thus indicating that the Commission had in mind the construction of the cut-off and its use by the Rio Grande.

At that time there was no assurance that trackage agreements between the Rio Grande and the Salt Lake would be consummated. The latter had not filed its counter-proposals with the Commission in the Dotsero Cut-off case, and even if it had, the terms might have been unacceptable to the Rio Grande, with a resulting deadlock, since the Commission had no authority to compel such agreements except as it might deny the Salt Lake Western's application to construct the cut-off unless they were made.

In view of the Commission's plan of consolidation which rendered a future consolidation of the two properties possible if not probable, and also of the uncertainties regarding the trackage agreements, and the serious effect, as already explained (*supra,* pp. 16-17), upon the Rio Grande of operation of the cut-off by the Salt Lake, in January, 1930, the Rio Grande purchased at $155 per share, 21,334 shares (of the 50,000 outstanding) of Salt Lake Company's stock (R. 65). As that did not constitute

a control, no authority from the Commission for its acquisition was required. But shortly thereafter it entered into an agreement to buy an additional 7,635 shares (subject to the Commission's approval) which, with that already owned, would aggregate about 58% of the total outstanding stock (R. 65). Thereupon, on February 1, 1930, the Rio Grande filed with the Commission its application under Section 5, paragraph (2) of the Interstate Commerce Act (U. S. C. Title 49, Sec. 5(2)) for authority to control the Salt Lake by purchase of stock (R. 135).

(b) *The hearings and position taken by interveners other than appellants.*

Hearings occurred before the Commission's examiner at Denver and Salt Lake City, in March, 1930. In view of the fact that plaintiffs-appellants have abandoned in this court the allegations in the bill of complaint (R. 9), that the subsequent order of the Commission was not supported by the evidence, it is unnecessary to review the testimony which was presented, and which this court will conclusively presume authorized the order. It is important, however, to understand the attitude taken by the interveners in the proceeding, of whom there were many. With the sole exception of the present anonymous appellants, whose status we shall presently discuss, every intervener representing Colorado interests, including the Moffat Tunnel Improvement District and its Commission (R. 77-83), the Denver Chamber of Commerce (R. 83), Denver Union Stock Yards Company (R. 84-86), and Moffat Tunnel Taxpayers Association (R. 87), made no objection to the application providing that conditions were imposed assuring the prompt construction of the cut-off, and (though less uniformly urged) that the Craig gateway be left open. The Rio Grande, while anxious that the cut-off be constructed, was then reluctant to commit itself to a construction within a limited period because of the pending litigation between the Moffat Tunnel District and the

Salt Lake over the validity of the tunnel lease (R. 66, 74-77), and it thought that it should not be bound by stringent provisions concerning possible future connections at Craig in the absence of any knowledge concerning such hypothetical connection. As its witness stated (R. 71):

> "We might find ourselves in a position where we opened our line to a competitor and he did not open his line to us."

But as will be shown, the Commission imposed the two conditions requested by the Colorado interveners and they were satisfied.

As to Utah interests (other than appellant "Uintah Basin Railroad League"), the position of the Bamberger has already been stated (*supra*, p. 8); the Utah Shippers Traffic Association expressed the opinion that any railroad connecting with the Salt Lake at Craig "should have unlimited tr[illegible]age rights over the Moffat Road" (R. 108); and the Utah Public Utilities Commission stated that "it is unopposed to the application here, if provision be made and an understanding had that the granting of it shall not in any manner preclude or be prejudicial to any applicant who desires to furnish transportation facilities to the Basin" (R. 117). This presumably meant that the Craig gateway should be left open, as the Commission's condition requires.

(c) *Appellant interveners, their status and position.*

At the hearing, the present appellants intervened to oppose the application (R. 62). At the outset it is important to consider the status of these unincorporated associations with an anonymous membership:

> "The Moffat Tunnel League is sort of a commercial club of counties, a sort of an association of counties of Grand, Routt and Moffat, all in the tunnel district; commercial clubs, which include ser-

vice clubs, nominate members of the League and the County Commissioners of the three counties each designate from such nominees the members of the Tunnel League. Nine members, three from each county, constitute the League, which has been in existence for about five years" (R. 89).

And the Uintah Basin Railroad League was thus described by its witness (R. 109):

> "I am Secretary of the Uintah Basin League which was organized within the last sixty days; this League is not incorporated, it is a cooperative organization of the service clubs, the towns, the irrigation companies, and the Boards of County Commissioners of Uintah and Duchesne Counties, representing practically all the people of those counties."

We shall further discuss these nebulous organizations in the succeeding argument on the question of their qualifications as plaintiffs in this proceeding.

The Rio Grande contended at the hearing that the real purpose of those appealing interveners was to block the construction of the Dotsero Cut-off (R. 94-95). Its counsel addressing their attorney inquired (R. 95):

> "Q. Are your clients opposed to the building of the Dotsero Cut-off?
>
> Mr. Vogl: No, sir, *but if the building of the Dotsero Cut-off would prevent the extension of the road westward,* yes, sir.
>
> Mr. McAllister: And your position further is that the building of the Dotsero Cut-off would very likely prevent it?
>
> Mr. Vogl: No, sir, if the Moffat Road builds it, they will also build westward where there is tonnage.
>
> * * * * *

Mr. McAllister: If the Denver & Salt Lake builds the Cut-off they will also build the extension?

Mr. Vogl: Yes, sir.

Mr. McAllister: Well, that is a very clear statement, even though it may be somewhat fallacious."

And their witness, taking somewhat the same position, said that "if the Moffat Road owned the Cut-off they couldn't compete with themselves" (R. 97).

We believe that the entire record justifies our statement that this position was a mere subterfuge resorted to because the cut-off was so overwhelmingly demanded by the public generally that opposition thereto would be unpopular among all except these nondescript interveners. Furthermore their logic was grossly faulty. It was that if the Salt Lake owned and operated the cut-off in connection with its own line, it would grow so rich in interchanging through traffic with the Rio Grande at Dotsero at the latter's expense, that it would extend its line from Craig to Utah common points, a distance of 300 miles, and thereby establish a competing line against itself. In brief, it would kill the goose that laid the golden egg and embark upon a perilous adventure.

Appellant's complaint is that the examiner excluded many of their offers of testimony, which is true. But in the interest of brevity the discussion of that question may be deferred to our argument where the character of this evidence will be discussed (*post*, p. 33).

(d) *The Commission's Report.*

Briefs were filed by all parties, oral argument had, and on December 2, 1930, the Commission issued its report discussing all matters very fully (Ex. C to bill of complaint, R. 17; *D. & S. L. Control*, 170 I. C. C. 4). In

conclusion, it said, in substance, that "upon the facts presented we find that the acquisition" by the Rio Grande of control of the Salt Lake by purchase of stock, "will be in the public interest," subject to the following conditions (R. 33-34):

(1) That the Rio Grande should purchase at not exceeding $155 per share any shares of Salt Lake stock which might be offered to it for purchase within six months from the date of the order to be entered;

(2) That the Rio Grande, through the Salt Lake "will establish such through routes in connection with any western connection hereafter constructed under our authority as we may find in a subsequent proceeding or proceedings to be reasonable and in the public interest"; and

(3) That the Rio Grande, through the Salt Lake, should "commence the construction of the Dotsero Cut-off within six months from the date of any order to be entered herein, authorizing the proposed acquisition, and shall complete such construction within two years after beginning it."

And the report concluded (R. 34):

> "No order will be entered at this time. Prior to the entry of any order authorizing the proposed acquisition the applicant shall file with us, for our approval, its unqualified acceptance of the conditions herein prescribed. For the purpose of considering such acceptance, if filed, the proceeding will be held open for 90 days."

3. Subsequent proceedings in the Dotsero Cut-off case (Finance Docket 4555) and the Control case (Finance Docket 8070) and consequent events.

As just stated the Commission's report in its Finance Docket 8070 required the Rio Grande to file within ninety days after December 2, 1930, its unqualified acceptance of the three conditions imposed by the report, which time was subsequently extended (R. 14). As to the Dotsero Cut-off case, Docket 4555, our previous statement ended with the filing by the Rio Grande with the Commission, in May, 1929, of its proposed trackage agreements with the Salt Lake Company (*supra,* p. 18). We now present the succeeding events in the two dockets, which ran concurrently, the Commission treating them as "closely interdependent" (R. 14, 155).

On July 17, 1931, the Rio Grande filed with the Commission its unqualified acceptance of the latter's conditions in Docket 8070 (R. 15, 155), and on the same date the Rio Grande and the Salt Lake joined in filing with the Commission, as contemplated in Docket 4555, forms of agreements governing (1) the construction and operation of the Cut-off by the Rio Grande and (2) granting to it trackage rights over the Salt Lake line between Denver and Orestod (R. 155).

On September 15, 1931, the Commission entered two orders, one in each docket (*D. & S. L. Control,* 175 I. C. C. 542, R. 13; *D. & S. L. W. Construction,* 175 I. C. C. 535, R. 154). The substance of these orders was that in Docket 8070, in view of the Rio Grande's acceptance of the conditions, it was authorized to acquire control of the Salt Lake (R. 15); and in Docket 4555, in view of the trackage agreements which had been made, the Salt Lake Western (to become a wholly-owned subsidiary of the Rio Grande) was authorized to construct the Dotsero Cut-off subject, however, to the express condition that such construction

should be commenced within six months from the date thereof and completed within two years after commencement (R. 161).

The Commission's conditions imposed two very onerous obligations upon the Rio Grande, (1) to purchase at $155 per share all or any part of about 20,530 shares of Salt Lake stock which might be tendered to it for purchase within six months and (2) commencement of construction of the Cut-off within six months and completion thereof within two years after commencement, the estimated cost being $3,800,000. When these orders were promulgated in September, 1931, the unprecedented financial crisis had become even more acute, England was going off the gold standard, and railroad credit was practically destroyed. This condition continuing during the next six months, the Rio Grande applied to the Commission for an extension of time within which to comply with the conditions, and under date of March 15, 1932, the Commission extended the time for purchase of stock and commencement of construction until June 15, 1932 (*D. & S. L. W. R. Co. Construction*, and *D. & S. L. Control*, 180 I. C. C. 715). Later, under date of June 14, 1932, upon the Rio Grande's further application for extension, this date for both purchase and commencement of construction was extended to September 15, 1932 (*D. & S. L. W. Construction* and *D. & S. L. Control*, 184 I. C. C. 721).

Confronted by these orders, the Rio Grande conducted negotiations with the Salt Lake and its minority stockholders (who had the right to tender their stock for purchase) to the following effect: The time when minority stockholders might tender their stock was extended until July 1, 1934, and any stock so tendered during the six months beginning with that date, would be purchased by the Rio Grande at $155 per share with interest from date of tender, on or before July 1, 1935, but meanwhile this right of the stockholders to tender, and (if tendered) the obligation of the Rio Grande to purchase, would be collat-

eralized by a deposit with the Colorado National Bank of Denver, as escrow holder or trustee, of an equal amount of shares owned by the Rio Grande, to-wit, 20,530 shares. As to the construction of the Cut-off, the Rio Grande would apply to Reconstruction Finance Corporation for a loan to commence and complete the construction. This plan was presented to the Commission and, as to purchase of stock, was approved by its report and order of September 10, 1932 (*D. & S. L. W. Construction, and D. & S. L. Control*, 187 I. C. C. 395). On the same date the Commission, in Finance Docket 9562, approved a loan by Reconstruction Finance Corporation to the Rio Grande in the sum of $3,850,000 for the purpose of acquiring control of the Salt Lake Western ($50,000), and constructing the Dotsero Cut-off (187 I. C. C. 399), and the Reconstruction Corporation thereupon approved and authorized the loan. The Commission's order requires the Rio Grande, among other things, to pledge all of the Denver and Salt Lake *Western* stock as security for the loan (187 I. C. C. on 408).

Under date of September 15, 1932, the Commission amended its previous orders in both dockets, relative to commencement of construction of the Cut-off and extended the time until November 15, 1932 (order unreported).

As to the purchase of stock, the Commission's amended order has been complied with by the Rio Grande's deposit with the escrow holder of the number of shares equaling the minority stock, 20,530 shares, and as to the Cut-off, the Rio Grande has acquired control of the Salt Lake *Western* Company, through which it is now engaged in constructing the Cut-off with the proceeds of the loan from Reconstruction Finance Corporation.

Further, under date of November 26, 1932, the Commission authorized the Rio Grande, under paragraph (18) of Section 1 of the Interstate Commerce Act to operate, under trackage rights, over the Salt Lake's railway between Utah Junction (Denver) and Orestod, and over the

Dotsero Cut-off (*D. & R. G. W. Operation,* 189 I. C. C. 129), thereby confirming, and obligating the Rio Grande to, the trackage agreements (*supra,* p. 25); and under date of December 2, 1932, by report and order as yet unprinted, the Commission, in its Finance Docket 9720, authorized the Salt Lake *Western* to issue its stock in the amount of $3,850,000 to the Rio Grande, for the purpose of securing funds to build the Cut-off, and further authorized the Rio Grande to guarantee dividends on the stock, all as required by the Commission in its report approving the Reconstruction Finance Corporation loan, *supra.*

II.

ARGUMENT.

Points to be Argued.

The bill of complaint alleged that the Commission's order was "entirely unsupported by any evidence and is, therefore, illegal, null and void" (R. 9), and that point was slightly stressed in the district court. It has been abandoned here, was not mentioned in appellant's statement of points relied on (R. 162) and has not been urged in their brief. It is, therefore, conclusively presumed that the order was sustained by the evidence. This court will not review the Commission's determination, weigh the evidence, substitute its judgment for the Commission's or question the soundness or wisdom of its findings and conclusions (*U. S. v. New River Co.,* 265 U. S. 533, 542; *Virginian R. Co. v. U. S.,* 272 U. S. 658, 665-666; *C., R. I. & P. Ry. Co. v. U. S.,* 274 U. S. 29, 33-34; *Georgia Comm. v. U. S.,* 283 U. S. 765, 775). In appellants' brief, reference is made to a dissenting opinion by one Commissioner. Of course that opinion cannot be regarded as the Commission's action, but it is noteworthy that even it did not contend that the Commission's order was not supported by evidence, or that any testimony had been improperly excluded.

The sole questions for this court's decision will be argued under the following headings:

1. PLAINTIFF-APPELLANTS, AS VOLUNTARY, UNINCORPORATED ASSOCIATIONS, HAVE (a) NEITHER CAPACITY TO SUE, NOR (b) A LEGAL INTEREST OR ANY RIGHT THREATENED WITH LEGAL INJURY BY THE ORDER, ENTITLING THEM TO SUE.

2. THE EVIDENCE EXCLUDED BY THE COMMISSION'S EXAMINER WAS EITHER ENTIRELY IMMATERIAL OR MERELY CUMULATIVE AND ARGUMENTATIVE, OR CONFIRMATORY OF UNCONTESTED FACTS RECOGNIZED BY ALL.

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1. Plaintiff-appellants, as voluntary unincorporated associations have (a) neither capacity to sue, nor (b) a legal interest or any right threatened with legal injury by the order, entitling them to sue.

The brief for the United States and the Commission contains a full and conclusive argument upon both of these features. It would be but appropriation of the labor of their counsel and a trespass upon the indulgence of this court to undertake an extensive and independent presentation of these important propositions standing at the threshold of this controversy and which, we believe, must result in affirmance of the decree under review. We rely upon the argument of that brief as our own. But perhaps a few words concerning the anonymous appellants should be stated. Their composition as shown by the record has already been stated (*supra*, pp. 21-22). The Moffat Tunnel League is "a sort of a commercial club of counties, * * * commercial clubs, which include service clubs, nominate members of the League and the County Commissioners of the three counties each designate from such nominees the members of the Tunnel League. *Nine members, three from each county, constitute the League*" (R. 89).

So it seems that this "League" has but nine members, selected by County Commissioners out of a larger list submitted by "so-called Service Clubs, the Lions, Kiwanis and Rotary, and so forth" (we quote from the argument of plaintiff's counsel in the court below). Those organizations are no doubt highly laudable and agreeable societies, but neither they nor the boards of County Commissioners are vested by law with any authority to supervise railroad transportation or to create any such "Leagues." The name of any one of the nine members does not appear in the record. There is no evidence that any one of them is a shipper or rides on the Salt Lake, or is a property owner or a taxpayer in the county where he resides or in the Moffat Tunnel Improvement District. Presumably he is just a resident having no more interest in the questions at issue than any other member of the public, and certainly not endowed by any legal interest through his membership in a "League" created in such an informal, extralegal manner as appears here. In the opinion of the District Court (R. 127) and brief for the government and the Commission, authorities are cited to the effect that an unincorporated association has no legal entity entitling it to sue. It is true that in *United Mine Workers v. Coronado Co.*, 259 U. S. 344, while the general rule was recognized that unincorporated associations had no capacity to sue or be sued except in the names of their members (p. 385), it was held that by reason of the national character of the organization there involved, its great and powerful membership and its recognition by legislation both national and state, it was an exception to the rule (pp. 383-388). No such exception is applicable to this "League" of nine men, which attempts to run counter to the position taken by the Moffat Tunnel Commission (the governing body of the Moffat Tunnel Improvement District), two of whose five members come from the counties where the League is supposed to have its habitat (Colo. S. L. 1922, p. 92; S. L. 1927, p. 491; S. L. 1931, p. 455),

and the Public Utilities Commission of Colorado, which has charge of and control over railroad service and transportation. In other words, this League of nine unnamed persons, having no special interest, claiming to represent counties whose real estate is subject to perhaps 5% of the total assessments leviable in the tunnel district, the principal one (Moffat) representing only 1½% of such assessments (R. 80), has sought to become the *dominus litis* in this proceeding, against all statutory bodies and other well recognized organizations such as the Denver Chamber of Commerce.

The Uintah Basin Railroad League is in a similar category (*supra*, p. 22), although its witness took in a little larger territory. It also is composed, he says, of service clubs (Lions, Rotarians, and Kiwanians), besides unnamed towns, "irrigation companies" and boards of county commissioners, not one of whom is shown to be a shipper or to have any special, legal interest or authority in these matters. This "League" being outside of the Tunnel District was deprived of the argument concerning special assessments. It was organized *within sixty days prior to the hearing*, but like its Colorado prototype it seeks to dominate the proceeding in behalf of a mythical railroad, notwithstanding the Public Utilities Commission of Utah stated that it was unopposed to the application "if provision be made and an understanding had that the granting of it shall not in any manner preclude or be prejudicial to any applicant who desires to furnish transportation facilities to the Basin" (R. 117).

Certainly such conglomerate associations of unknown and nebulous membership have no capacity to sue, but if they had they have no such legal rights to protect or legal injuries to redress as entitle them to maintain this suit (*Edward Hines Trustees v. U. S.*, 263 U. S. 143, 148; *Sprunt v. U. S.*, 281 U. S. 249, 254; *Pittsburgh & W. Va. R. v. U. S.*, 281 U. S. 479, 486). If, as held in those cases,

a party whose business will be adversely affected by the Commission's order, or a minority stockholder of an affected carrier, has no such standing, it is impossible to conceive that these appellants have a justiciable right. In the *Pittsburgh & West Virginia case* the court said, referring to the plaintiff minority stockholder (p. 487):

> "This financial interest does not differ from that of every investor in Wheeling securities or from investor's interest in any business transaction or lawsuit of his corporation."

Whatever interest either of these leagues or their members has does not differ from that of every other resident in either of the districts or sections of the two states, and both the *Sprunt* and *Pittsburgh and West Virginia cases* definitely settle that the mere fact that these leagues were permitted to intervene before the Commission does not entitle them to institute this independent suit to vacate the Commission's order (281 U. S. on 255 and 486).

It is obvious that this case has no likeness to those wherein it has been held that railroad or ferry companies whose operations would be directly injured or jeopardized by the Commission's orders may sue to protect their legal rights (*Chicago Junction Case*, 264 U. S. 258; *Western Pacific v. Southern Pacific*, 284 U. S. 47; *Claiborne-Annapolis Ferry Co. v. U. S.*, 285 U. S. 382); or to *I. C. C. v. Diffenbaugh*, 222 U. S. 42, a suit brought not merely by boards of trade having a vital interest in the grain traffic of their communities but by the owners of grain elevators some of whom had contracts with carriers, to enjoin an order of the Commission prohibiting payments by carriers to elevators for service respecting grain in transit. It is to be noted that this court gave little consideration to the question of plaintiffs' standing inasmuch as the Commission did not press the point (222 U. S. on 49), and while that case is not comparable to this, it may well be doubted

whether in view of the *Hines* and *Sprunt cases, supra,* this court would now reach the conclusion acquiesced in in that case. And finally, while there may be language in some of these cases on which appellants rely giving them an excuse for arguing the point, such language must be read in the light of the radically different facts therein presented and the court's subsequent decisions, and restricted accordingly.

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2. The evidence excluded by the Commission's examiner was either entirely immaterial or merely cumulative and argumentative or confirmatory of uncontested facts recognized by all.

(a) *Generally as to the Commission's procedure.*

Proper consideration of appellants' complaints with respect of rejection of alleged evidence cannot be given without regard to the cases that had preceded the hearing at which it was offered.

In 1928 the Commission conducted an extensive hearing on the application of the Salt Lake *Western* to build the Cut-off. The Rio Grande and many other Colorado and Utah interests intervened (R. 143) and were heard. Neither of the present appellants appeared though it seems that the Moffat Tunnel League was then in "existence" (R. 89), and as it took the Uintah Basin League only sixty days to create itself and appear full-panoplied in the present case, it is evident that it could readily have sprung into being for that hearing. In April, 1929, the Commission promulgated its report indicating that the application would be granted providing the Rio Grande was granted trackage rights over the cut-off and the Salt Lake in order to shorten and protect its route (*supra*, pp. 17-18). That report was formally introduced at the hearing (R. 143), and thoroughly deals with the public necessity not only for the cut-off but for the Rio Grande's user.

Appellants claim that they did not intervene in that case because they had no objection to construction and operation by the Salt Lake, a matter we have hereinbefore discussed (*supra*, pp. 22-23). But even after the Commission indicated that Cut-off operations should be by the Rio Grande, appellants raised no protest though they might still have intervened. So that case had been fully heard and a conclusion reached when this control case came on.

In 1925, the Commission conducted a full hearing for several days upon the Bamberger application to build from Provo to Craig. Many parties intervened including numerous commercial clubs and corporations in the Uintah Basin and at Craig, and Moffat County itself. In July, 1926, the Commission's examiner filed a proposed report adverse to the application, to which the Bamberger excepted and then lapsed into a state of atrophy from which it never emerged. The facts respecting this application have also been fully presented (*supra*, pp. 9-10). Of course the Commission learned in that proceeding (if it had never known before—which is inconceivable) of the existence of the Uintah Basin, its lack of railroad facilities and its traffic possibilities which were painted in vivid colors by the hand of a master in the art—Mr. Bamberger himself. So that case had also been heard.

Consequently when the hearing in the present case was opened in March, 1930, the Commission had heard and rendered its report in the Dotsero Cut-off case, had heard and its examiner had long since rendered his proposed report in the Bamberger-Uintah Basin case.

The present hearing was conducted by Haskell C. Davis, one of the most experienced examiners of the Commission's finance division. His long experience in that capacity had doubtless made him thoroughly familiar with the great labor thrown upon the Commission—the hardest worked administrative body in the world—by injection into its voluminous records of masses of irrele-

vant, immaterial, cumulative and argumentative matter as well as facts of such general notoriety as to entitle them to judicial notice. So well known has this been that it has become a trite saying that in these Commission hearings "the lawyers testify and the witnesses argue the case." The examiner doubtless scented similar trouble in the case he was about to hear, and he stated at the outset (R. 62):

> "I have got nothing here about extending the Denver & Salt Lake westerly, Mr. Vogl, not hearing any case of that kind at all, or anything concerning Uintah Basin needs for railroad facilities. * * * We have a specific case here, and I will limit the evidence to what covers this specific case. * * * Now, I am hearing the application of the D. & R. G. to acquire stock control of the Denver & Salt Lake; I am not hearing the Dotsero Cut-off case or Uintah Basin case, or anything of that kind, I am confining the issues to what is before us.
>
> Now, in taking testimony, testimony in its general nature which is merely cumulative will not be taken. Now, that rule will be strictly enforced, and you will govern yourselves accordingly."

The examiner adhered to that statement throughout, and he was clearly right. If after the Commission hears and determines an application involving public interests on an extended record, it must in a subsequent collateral proceeding throw the bars down and open the whole field for testimony and argument, shutting its eyes to what has previously transpired, then its burdens will become intolerable. Ossa will be piled on Pelion in utter confusion. Of course, that cannot be true. A somewhat similar situation appeared in *Georgia Commission v. U. S.*, 283 U. S. 765. There the Commission had prescribed certain reasonable interstate rates on Georgia products, but first declined to harmonize intrastate rates with them, saying that

the *Georgia Commission* would doubtless cooperate to that end. It declined to do so, whereupon the Commission granted a rehearing upon the carriers' application, to determine whether the *intrastate* rates resulted in undue prejudice to *interstate* shippers. At that rehearing, the Georgia Commission demanded that the Commission again receive evidence as to the reasonableness of the interstate rates it had previously prescribed. The Commission rejected this evidence saying (160 I. C. C. on 313, quoted in footnote to 283 U. S. 770):

> "If the contention made * * * in this regard were sound, then our efforts to secure cooperative action in situations such as here presented, instead of bringing about that result, *could be made the instrument of burdening this commission with endless investigations covering the same subject matter and would result in litigation being prolonged indefinitely.*" (Italics ours.)

The Georgia Commission attacked the Commission's action and sought to set aside its order because it was not the result of a "full hearing." This court sustained the order, saying that while such an order required a determination of reasonable interstate rates, that having been done in the original proceeding and no change in conditions being shown, no reconsideration of that issue was required.

In their brief, appellants attempt to prove the examiner guilty of irregular conduct because of this statement of the district court in the case at bar (R. 129):

> "Realizing that much of this controversy had already been decided by the Commission in the previous cut-off proceedings, the Examiner was firm in holding the examination to the single ultimate question of public interest involved in the proposed stock purchase and control of one railroad by the other."

That is the quotation appellants rely on, but it may be well to place in juxtaposition to it, the district court's statement immediately following, correctly explaining the remarkable purpose of the appellants (R. 129):

> "The intervenor-plaintiffs however wished to open up the controversy from the beginning and introduce evidence on nearly every phase, including the views of witnesses who had, when the controversy was raging, in the public press and on the public platform, expressed themselves in a particular way."

Appellants claim that the first quoted statement "convicts the Examiner of proceeding directly contrary to the decisions of this Court," and *B. & O. R. Co. v. U. S.*, 264 U. S. 258, *U. S. v. Abilene & S. R. Co.*, 265 U. S. 274 and *I. C. C. v. Louisville & N. R. Co.*, 227 U. S. 88, are cited in support of the claim that the Commission had no right to consider what it had decided in the previous cases. Those authorities go no further than to hold that *evidence* must be introduced before it may be considered, but they certainly do not sustain the proposition that the Commission must be oblivious to its previous reports and orders. And in the present case its report and order in the Dotsero Cut-off case was actually placed in evidence (R. 63, 143). See, *U. S. v. B. & O. S. W. Ry.*, 226 U. S. 14, 20.

Our views on these questions are admirably expressed by the three-judge District Court for the Western District of Pennsylvania, in *Pennsylvania R. R. Co. v. U. S.*, 40 Fed. (2) 921, a suit to set aside an order of the Commission. Therein, referring to a prior decision of the Commission in a related matter, the court used this language especially applicable here (p. 924):

> "The Commission was not required to shut its eyes to what it saw in that proceeding or close its mind to the knowledge it there acquired, and proceed afresh in the instant application for a short

extension from the long one without regard to what it knew—and could not forget—had a bearing one upon the other. Whatever regard the Commission may have given the former application *as a related matter, distinguished from an evidential matter, in determining the later application cannot invalidate its last order.* United States v. Abilene & S. R. Co., 265 U. S. 274." (Italics ours.)

And earlier in that opinion the court said (p. 923):

"Nor do we think that, as in the case of a judge trying facts, every phase of every fact pertinent to an application for a certificate of convenience and necessity need formally be proved and formally found because, in reposing discretion in the Commission, the Congress evidently had in mind that it was legislating with respect to a body of experts whose knowledge of transportation had through the years been accumulated from innumerable sources throughout the United States, and that, in carrying out the new policy of the transportation law, it intended that they should act as such, just as it looks upon the United States Board of Tax Appeals as a body of experts on taxation and intends, in given cases, such as special assessment of corporation taxes, that they should act as experts, and from their action in those cases it provided no appeal."

In *I. C. C. v. C., R. I. & P. Co.*, 218 U. S. 88, 110, this court said with respect to an order of the Commission:

"Such decision, we have said with tiresome repetition, is peculiarly the province of the Commission to make, and that its findings are fortified by presumptions of truth, 'due to the judgments of a tribunal appointed by law and *informed by experience.' Illinois Central Railroad Company v. Interstate Commerce Commission,* 206 U. S. 454, and cases cited." (Italics ours.)

But the essence of appellants' argument is that this Commission "informed by experience" must convert its mind into a state of complete vacuity whenever it hears a case, no matter what has gone before. This is *reductio ad absurdum.*

There are other well-established principles to which we refer before proceeding to a discussion of the testimony excluded. They are that the "Commission is an administrative body and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules as to the admissibility of evidence, which prevails in suits between private parties" (*Interstate Com. Comm. v. L. & N. R. Co.,* 227 U. S. 88, 93). And in *U. S. v. Abilene & So. Ry. Co.,* 265 U. S. 274, 288, the court said:

> "The mere admission by an administrative tribunal of matter which under the rules of evidence applicable to judicial proceedings would be deemed incompetent does not invalidate its order. *Interstate Commerce Commission v. Baird,* 194 U. S. 25, 44; *Spiller v. Atchison, Topeka & Santa Fe Ry. Co.,* 253 U. S. 117, 131. *Compare Bilokumsky v. Tod,* 263 U. S. 149, 157."

In *Bilokumsky v. Tod,* 263 U. S. 149, the last case cited in the foregoing excerpt, the court said (p. 157):

> "Moreover, a hearing granted does not cease to be fair, merely because rules of evidence and of procedure applicable in judicial proceedings have not been strictly followed by the executive; or because some evidence has been improperly rejected or received."

In *Spiller v. A., T. & S. F. R. Co.,* 253 U. S. 117, an action to recover reparations awarded by the Commission, the court said (p. 126):

> "If we were called upon to review the proceeding as upon a writ of error or appeal it might

be difficult to say that no improper evidence was admitted, that production of the best available was insisted upon, or that a different conclusion might not have been reached upon that which was admitted. But the scope of the judicial review is not so extensive."

Finally, before proceeding to discuss the specific offers to prove, we submit in the light of the above authorities that the rulings of the examiner are not to be tested by those enforced in judicial proceedings; that this court would not be justified in enjoining the Commission's order even though it might conclude, from the standpoint of a lawsuit, that testimony should have been admitted, providing, of course, that the record contains substantial evidence to sustain the order; and that unless the court should believe that material evidence was excluded, and that it was of such nature that the Commission's report and order would have been different if it had been received, the court will not enjoin the Commission's decision. If every order of the Commission is to be enjoined because of departure from the rules applied in courts of law, it may safely be asserted that few of them would stand. The application of such a principle to the Commission's orders would result in an intolerable flood of litigatio and in practical destruction of the Commission's authority and powers.

Nothing in the preceding discussion must be taken as an admission that the Commission or its examiner erred in the case at bar. We have emphasized that the contentions of present appellants would emasculate the Commission's jurisdiction and subject to attack practically every order it makes.

We now proceed to a discussion of the alleged errors in exclusion of testimony and propose to substantiate the statement of the present heading.

(b) *Offers as to the desirability of extension westerly from Craig.*

It is a fair statement that the great burden of appellants' argument is that the examiner erred in excluding evidence of old plans (now obsolete) to extend the Salt Lake westerly and the need for such an extension. While appellants' brief enumerates thirteen items of excluded offers identical with those specified in the bill of complaint (R. 6-7), they may be broken down into a very few headings, and running through practically all of them is the claimed necessity for this western extension. The following is, we believe, a substantially accurate summary of the offers dealing specifically with this question:

> That the public convenience and necessity requires the construction of an extension westerly from Craig (R. 93) (of course that is not an offer of testimony but a mere conclusion); that from the time the Salt Lake commenced construction it was held out that the purpose was to construct the extension (R. 94); that many hundreds of settlers were induced to go into the Basin by reason of "prospects" held out to them by the Salt Lake's predecessor, government agents and commercial bodies of the "imminent probability" of the extension and that they left because of lack of railroad facilities (R. 112); that the Salt Lake's predecessor conducted a campaign of colonization and held out to the public and possible settlers that its purpose was to extend the line to Provo or Salt Lake City, and that advertisements appeared holding out that inducement (R. 112); and that the government held out similar inducements for colonization by advising of the "probability of the extension" (R. 112).

Substantially all of these offers were presumably to be made good through a witness (Paul) who lives in the

Uintah Basin and had been connected with the *old* Moffat road prior to 1918 (R. 109) and it is perfectly evident that they related to what occurred many years ago, certainly not within the past fifteen years.

Preliminary to a discussion of those offers, we note that the first claimed exclusion was of evidence "that the construction of the Moffat Road has from the beginning included a plan * * * for a western extension" (R. 6). That offer (R. 81) was not made by the appellants but by counsel for other parties who have not appealed. It cannot be invoked by appellants, for "we have said several times that we will not listen to a party who complains of a grievance which is not his" (*I. C. C. v. C. R. I. & P. R. Co.*, 218 U. S. 88, 109). It is important, however, only because it might indicate that this plan existed at the time of the hearing or until shortly before. That offer was made before it was developed by the examination of the Salt Lake's chairman, largely conducted by the same counsel who made the offer, that the Salt Lake has no such plan and has had none in recent years (R. 98-99; *supra*, pp. 7-8).

We make that clear so that the court will understand that the omnibus offers to prove inducements, advertisements and solicitations for colonization deal with a dead past, and not with the present Salt Lake Company.

Now, it required no proof whatever that there was no railroad through the Basin, and that its transportation conditions would be improved by a railroad (even though other forms of transportation constitute increasingly ominous competition). That was conceded in the Rio Grande's brief in the Bamberger case extracts from which were introduced by these appellants (*supra*, pp. 10-11). It was recognized by all. It required no proof that all residents in the Uintah Basin would be delighted to have a

railroad, though they might not patronize it, provided they were not required to contribute capital for its construction. But of what possible materiality in this case would be evidence of old and obsolete plans or abandoned "promises" or "prospects" or assurances of "imminent probability," in the face of the fact that there was no one in sight at the time of the hearing willing to risk a dollar in the hazardous enterprise of building 300 miles of railroad even in the "boom" years of 1925 to 1929 to say nothing of 1930 when the hearing occurred. This was not an application to extend the road, nor was there any party before the Commission objecting to the Rio Grande's application because he was ready to extend. Bamberger was there it is true, but from our summary of his case on page 8, it will certainly appear that his dream had faded, and all he asked was that if *any* railroad was *ever* built by *anyone*, that party should have *trackage rights over the entire Salt Lake*. Even if the Salt Lake were financially able to carry the heavy burden, it could not be forced against its will to make this extension (*I. C. C. v. Oregon-Washington R. & N. Co.*, 53 Sup. Ct. Reptr. 266).

Is the public interest in the immediate building of the Dotsero Cut-off which it was believed would be accelerated by the Rio Grande's control of the Salt Lake, to be frustrated by the mere hope that sometime, somehow, a railroad will be built through this Basin? We think the answer must clearly be in the negative. But even if a scintilla of materiality could be found in the offers, is it conceivable that such testimony would have influenced the Commission's action in the least? It knew all that it was necessary for it to know respecting a possible extension, from the facts in evidence. Its examiner stated more than once that he would receive a statement of conditions which it was felt should be attached to the order (R. 79, 102). For example he said (R. 102):

> "I do not care to take general testimony involving the construction of a new line through the Uintah Basin; but they feel it is necessary to introduce some testimony as a basis for their requests to attach conditions to the order. I think they have a right to do that. I will let them introduce a reasonable amount of testimony for that purpose."

And when the Commission issued its report it devoted two pages to a discussion of this feature (R. 27-28), and because of the expressed desire of many parties, and probably due to the position of appellants themselves, it required the Rio Grande to agree in writing filed with it, that through the Salt Lake, it would "establish such through routes in connection with any western connection hereafter constructed under our authority as we may find in a subsequent proceeding or proceedings to be reasonable and in the public interest" (*supra*, pp. 24-25).

That was certainly all that the Commission could reasonably do for the protection of a hypothetical railroad, or the hopes of the people of the Uintah Basin.

As proof that this offered testimony was merely cumulative or of unnecessary detail, and that the record was ample to enable appellants to make their contentions before the Commission, we feel justified in quoting a very lurid extract from their brief filed with the Commission at the conclusion of the hearing:

> "The evidence, limited though it was by the Examiner's exclusion of testimony, shows that west of Orestod is a great empire of vast and varied resources; that encouraged with the vision and promise of coming railroad transportation, pioneers have gone into this empire to develop it; that they have been willing to back their belief in the country with a pledge of their credit for the construction of the Moffat Tunnel; that by the cooperation of the

railroads and the taxpayers the Moffat Road is now earning substantial net incomes instead of annual deficits; that now the applicant—which in the past has neglected its own territory in Colorado because of its ambitions to be a transcontinental line—sees in the Moffat Road an aggressive and growing competitor and it is therefore seeking to control this competitor."

Of course the able counsel for appellants would not have made that argument unless he believed there was evidence in the record which justified it, and if there is anything in the rejected offers which would have enabled him to paint his picture even more vividly, it would certainly be cumulative.

The District Court very properly said concerning those matters (R. 129):

> "Some of the matters that the intervenor-plaintiffs desired to introduce were not pertinent to the precise issue then involved. Moreover, they had nothing tangible on which to base objections to the stock acquisition. Neither the plaintiffs nor anyone else had a plan to do what all (with the probable exception of the Rio Grande) desired, namely: the extension of the Moffat Road west from Craig to the Uintah Basin. Nor was there any evidence of a likelihood of any plan being made until traffic conditions should inspire one.
>
> The intervenor-plaintiffs suggest that if the Commission's order should, as they urge, be annulled, the first order authorizing the Moffat Road to build the Cut-off would stand. Yet, if that be true, it would stand with its unperformed condition as to trackage rights, and the situation would remain as it has stood through the years with no immediate prospect of building the Cut-off, which

everyone wants, and certainly no prospect even remote of an extension of the Moffat Road from Craig to the west. Such an extension would, without regard to ownership and control, inevitably depend on traffic conditions. So it appears that the exclusion of evidence was not prejudicial to any rights which the plaintiffs claimed but was only disturbing to their hope that somehow, sometime, in some way the Moffat Road would be projected from Craig westwardly. Yet under the Commission's order the realization of that hope is preserved for it expressly leaves open the way westward and makes it just as possible to extend the road with the order in force as to extend it with the order annulled."

(c) *Offers as to the resources of the Uintah Basin in Utah.*

This is closely associated with the last topic. Appellants offered to prove by *twelve* Utah witnesses

> "the available resources of the Uintah Basin, for the purpose of showing the public interest in having a construction of the present Denver and Salt Lake Road, either by the Denver and Salt Lake road or by some other company, west from Craig to either Provo or to Salt Lake City" (R. 111).

All that we have said answers the claim of error in excluding this testimony, but the mere statement of the offer shows into what a wide and useless field the case would have entered if the testimony had been allowed. If appellants had been permitted to prove by *twelve* witnesses the resources of the Basin, the Rio Grande could have assembled twelve others to combat that testimony, and, so encouraged, various interveners might have entered this arena so rich in controversial possibilities. Such testimony would have been vital if this were an ap-

plication to extend the railroad, but it would have been perfectly futile on the actual issues.

(d) *Offers as to the "extension" with respect to the Moffat Tunnel.*

Interlarded with the offers of proof regarding the desired "extension" was the Moffat Tunnel.

Much of this testimony was offered by other parties and not by appellants, for instance that found at pages 81 and 100 of the record and stated by appellants as items (2) and (3) (R. 7), and which is that in assessment of benefits in the Moffat Tunnel Improvement District there had been included the benefits to lands in the district resulting from operations over the Dotsero Cut-off, the Denver-Craig line and the "extension" (R. 81); and that the construction of the tunnel and the organization of the tunnel district were based on a "long series of public activities and public campaigns" by organizations in Colorado, as a means to facilitate successful operation of the Salt Lake, not only as a local road leading to the northwestern part of the state, but as a through connection for the general benefit of the state and of the various districts of the state, which it was expected would be made with Utah common points (R. 100).

We believe that appellants cannot avail themselves of these offers made by others (*I. C. C. v. C., R. I. & P. R. Co.*, 218 U. S. 88, 109). As said by the District Court (R. 129):

> "An analysis of the hearing indicates that some of the matters excluded were not offered in evidence by plaintiffs' counsel, but by counsel representing other intervenors of which we think the plaintiffs cannot avail themselves in this suit. These were matters for the others to complain about. This they have not done."

However, appellants did make offers of their own substantially as follows (R. 92):

> That the matter of the construction of the Moffat Tunnel has been of public importance to Colorado since about 1912; that during that time several projects were put forward and votes taken, both in the legislature and by referendum votes of the people, and that in each instance the people in the territory now included in the district voted for construction of the tunnel, and that the people along the territory which would be benefited by the Rio Grande's acquisition of the Salt Lake have consistently voted against it.

Regardless of the question as to appellants' right to complain of exclusion of offers on this subject, there was no error in such exclusion. The record fully shows the formation of the Moffat Tunnel Improvement District, the construction of the tunnel, the amount of outstanding bonds, the basis of assessments on real estate in the district, the lease of the tunnel to the Salt Lake and the rentals payable by it (R. 77-80, *supra,* pp. 4-6). Therefore the Commission was apprised of all relevant facts regarding the district, its boundaries, and the extent to which all real estate might be subjected to assessments to meet interest or principal of the bonds over its other revenues from the tunnel, which would include not only railroad rentals but those derived from other uses, for instance, water transportation (R. 80).

Of what possible value would be the motives which actuated legislators or people in voting upon any tunnel proposition either the one finally accomplished or any predecessor? Should evidence have been received from voters as to how they voted or what induced the votes they cast? How could one voter testify concerning the motives of another? And in this connection it may be observed that

the Moffat Tunnel Act was enacted by the legislature and not upon vote of the people, so that if the door had been opened, members of that body might have been called to testify as to what influenced their legislative votes. The record already clearly showed that one purpose of the tunnel construction was the possibility that it might be an aid to the western extension. The Commission itself had recognized this in the Dotsero Cut-off case as stated in its full report therein which was introduced in evidence (R. 144). But we again desire to emphasize, what we have already stated, that the two purposes of the tunnel construction to which this court referred in its opinion upholding the Moffat Tunnel Act, were the preservation of the Salt Lake road as actually constructed and the encouragement of the cut-off (*Milheim v. Moffat Tunnel District*, 262 U. S. 710, 718-720).

All the reasons we have previously stated against the materiality or relevancy of the testimony offered concerning the western extension are applicable to this associated matter and we contend, as we did with respect thereof, that all essential facts concerning the tunnel and the district had been fully presented, were recognized by all including the Commission, and that the offers contemplated injection of testimony not merely irrelevant but cumulative, and calculated to divert the hearing from the essential question involved.

(e) *Offers as to competition between the Rio Grande and Salt Lake, including coal.*

Paragraph (8) of Section 5 of the Interstate Commerce Act (U. S. C., Title 49, Sec. 5 (8)) expressly provides that any carrier affected by an order made under paragraph (2) of that section is relieved from the operation of the "antitrust" laws. The examiner permitted all of the testimony which was offered to show that there was competition between the Rio Grande and the Salt Lake.

For example, appellants' witness Johnson testified that there was competition "in a way" on horses, hogs, cattle, sheep, wool, gilsonite, oil and *coal* (R. 90), and that there was keen competition between the two railroads on livestock shipments (R. 89, 90, 96); and their witness Paul testified to competition on livestock, wool and gilsonite from Utah points (R. 110, 115). Of course this testimony did not stand uncontradicted. It was vigorously disputed by the Rio Grande. The disinterested witness Pexton of the Denver Union Stockyards, testified that whatever competition there was between the two railroads on livestock "would be limited to a very narrow zone" (R. 87), and similar testimony, contradicting appellants', was given by witness Taylor (R. 117-118). The Rio Grande's principal witness Williams, under cross examination by appellants' attorney said (R. 71):

> "The shippers on the Moffat Road and applicant's (Rio Grande's) road compete, but 'the roads do not compete, as I understand it'."

It thus appears that all of the evidence on competitive questions was permitted by the examiner.

But appellants contend that evidence concerning competitive coal fields on the Rio Grande and the Salt Lake was improperly excluded and they seek to annul the Commission's order on this account. The testimony on that subject appears at record page 90, where, after appellants' witness Johnson testified to competition on various commodities, including *coal*, he stated that he understood there was a large movement also of coal from points in Colorado on the Rio Grande. He further testified that the coals in the Routt County fields of the Salt Lake were of about the same quality as the coals on the Rio Grande. Those answers were given, Rio Grande's counsel objected and the objection was sustained, but the answers were not stricken and no further testimony with respect to competition between shippers of coal on the two railroads was

either presented or offered (R. 90), and, if it had been, it would have been purely cumulative. The Commission therefore had before it proof that there were competitive coals on these two railroads and, as an experienced body, this fact was self-evident. Appellants contend that in *Control of Virginian Railway,* 117 I. C. C. 67, the Commission considered the fact that there was competition between coals. In that case many coal operators appeared and vigorously protested. Without conceding that competition between shippers on two railroads is material, as distinct from competition between the railroads themselves, we assert that in this case all the evidence which was presented respecting competing coals, was in the record for the Commission's consideration. None of it was stricken and no offer was made by appellants to present further testimony on that subject. Furthermore, not a single coal operator on the Salt Lake intervened in the case to protest the acquisition of control, and it is impossible to conceive how these appellants could vicariously represent the coal interests, or that the witness Johnson (a milling and elevator operator) could give any testimony of value on this subject.

In its report the Commission dealt at length with this question of competition, mentioning coal, but held that the character and extent thereof was not such as to prohibit the granting of the application (R. 29-31).

The opposing brief states that it will be "easily seen" that the Rio Grande could give preference to coal on its line, as against the Salt Lake. If that be true, the fact being self-evident, no evidence was required, but it is difficult to see how the Rio Grande would be inclined to give such preference if it owned every share of Salt Lake stock, as may well happen under the Commission's order.

On this state of the record, without any offer of proof in addition to what was in the record, concerning competi-

tion between coal shippers on the two railroads, and without the appearance of any party interested in the traffic, there is no room for contention that the Commission's order should be set aside. Certainly all questions respecting competition were adequately presented by the record, and known to the Commission. If appellants had any desire to present further proofs on this subject it was their duty to make offers as they had done in other matters.

(f) *Offers as to possibility of diversion of traffic from the Salt Lake to the Rio Grande.*

This is item (11) of appellants' alleged errors in exclusion of testimony (R. 8). The only offer on this subject was to prove that "a large volume of construction material which necessarily will move into the territory adjacent to the Moffat Road and adjacent to the Rio Grande Western road, for purposes of construction of catch basins and similar devices in connection with the proposed construction of the Boulder Dam" and that if the Rio Grande was permitted to control the Salt Lake it would be in a position to divert this business to itself (R. 91-92).

We submit that this offer trifled with the situation. It apparently referred to some temporary shipments which might, at the option of the shipper, pass over the Rio Grande or the Salt Lake, and that the Rio Grande could, through its control of the Salt Lake, divert these shipments to itself. It is almost unnecessary to refer to the provision of the Interstate Commerce Act which vests in the shipper the control of the route which his shipment shall take (U. S. C., Title 49, Sec. 15 (8)). It is perfectly obvious that this testimony entered into the realm of surmise as to how these transitory shipments would move and it requires no further argument to establish that such testimony would not only have been immaterial and conjectural but would have had no influence upon the Commission and even if material should not result in the overturning of its order. It is ridiculous to contend, as ap-

pellants have done, that any diversion of these temporary shipments would "financially wreck" the Salt Lake.

In connection with this subject appellants assert that the Rio Grande's control would enable it to reduce the Salt Lake's line west of Orestod to the status of a branch or spur and thereby to impair the service thereon. That was a matter for argument to the Commission, there was no evidence supporting it. Both the Interstate Commerce Act and the Colorado Public Utilities Act vest in the respective commissions full authority to prevent such action if it were attempted.

(g) *Offers as to hostility of the Rio Grande to a western extension.*

This is item (13) of appellants' specification of alleged errors in exclusion of testimony (R. 8, 100). A reference to page 100 will show that the offer was not made by appellants but was made by other parties and was in substance an offer to prove that the enterprise known as the Rio Grande, *prior to its 1924 reorganization,* had manifested hostility to "construction of the facilities of the Denver and Salt Lake *Western* Railroad (sic) which would lead to an extension west."

Not only was this testimony offered by parties other than appellants, but it was made during the course of the examination of the chairman of the Salt Lake's board, who indicated that there had been no such hostility manifested by the Rio Grande in recent years (R. 98-99), and the offer resulted from the examiner's refusal to allow the witness to answer a question as to the Rio Grande's attitude *prior* to its 1924 reorganization. The examiner said (R. 99):

> "What difference does it make what the attitude was prior to 1924. This is 1930. I do not care to go way back in history six or eight or ten years; that does not help us any."

It is merely necessary for us to say that in the face of the evidence, which had just been given, that the Rio Grande had not manifested such opposition to the Salt Lake's extension since its 1924 reorganization, the evidence of what its prior attitude had been was entirely immaterial and certainly cannot be invoked by these appellants who did not participate in the offer.

The position of the Rio Grande with respect to a railroad through the Uintah Basin was fully shown by the record and has been presented herein (*supra*, pp. 7-13). Nothing could be gained by a repetition of what is there said.

III.

CONCLUSION.

Much of the argument in appellants' brief is devoted to quotations from the Commission's reports in other cases, and to *dissenting* opinions in the present case; to attempts at discrediting the Commission's final consolidation plan (*Consolidation of Railroads*, 159 I. C. C. 522) by references to Professor Ripley's prior report and the Commission's *tentative* report; to assertions that the Commission's condition requiring the Rio Grande, through the Salt Lake, to establish through routes with any future connection at Craig as the Commission may hereafter find to be reasonable and in the public interest, should have been stronger and in line with the condition it imposed in another case where the situation was different (*Clinchfield R. Lease*, 90 I. C. C. 113); and to quotations from the Commission's report in *D. & R. G. Investigation*, 113 I. C. C. 75, dealing with events from 1905 to 1915, and not with the present Rio Grande.

In other words the wisdom of the Commission's action and its judgment and conclusions were thereby impliedly attacked. As already stated this court has frequently said that it will not review such questions (*supra*, p. 28), and

they are improperly injected into this case and require no answer.

The Commission found that the control sought was in harmony with its consolidation plan and would advance the same (R. 33); that it would facilitate the prompt construction of the Dotsero Cut-off so urgently desired by all parties other than appellants (R. 33); and that it was in the public interest (R. 33). All parties, save appellants, approved and acquiesced in this decision, including the Public Utilities Commission of Colorado, the Moffat Tunnel Improvement District and its Commission, the Denver Chamber of Commerce, the Public Utilities Commission of Utah and others; and the State of Colorado ex rel. its Public Utilities Commission, and the Moffat Tunnel Improvement District intervened in this case to support the order.

Under the authorization and indeed the compulsion of the order and those supplementing it, and the condition imposed in the Dotsero Cut-off case, the Rio Grande has undertaken and is now engaged in the performance of obligations to the public especially onerous in these disjointed times (*supra,* pp. 25-28), and it is respectfully submitted that the hearing complied with the statute, cannot be attacked by these unidentified appellants having no legal identity, and that no errors were committed by the Commission.

The decree of the District Court should be affirmed.

HENRY MCALLISTER,
Solicitor for The Denver and Rio Grande Western Railroad Company, Defendant-Appellee.

ELMER L. BROCK,
Solicitor for The Denver and Salt Lake Railway Company, Intervener-Appellee.

ERSKINE R. MYER,
Solicitor for The Moffat Tunnel Improvement District and Moffat Tunnel Commission, Intervener-Appellees.

SUPREME COURT OF THE UNITED STATES.

No. 499.—October Term, 1932.

The Moffat Tunnel League and Uintah Basin Railroad League, Appellants, *vs.* The United States of America, Interstate Commerce Commission, the Denver and Rio Grande Western Railroad Company, et al.	Appeal from the District Court of the United States for the District of Delaware.

[April 10, 1933.]

Mr. Justice Butler delivered the opinion of the Court.

Appellants brought this suit against the United States, the Interstate Commerce Commission and the Denver and Rio Grande Western Railroad Company to set aside an order of the Commission, made pursuant to 49 U. S. C., § 5 (2),[1] authorizing that company by stock purchase to acquire control of the Denver and Salt Lake Railway Company—called the Moffat Road. The latter, the Moffat Tunnel Improvement District, and the State of Colorado by its Public Utilities Commission intervened as parties defendant. The grounds of suit alleged in the complaint are that the order is not supported by evidence and that, because the examiner excluded

[1] "Whenever the Commission is of opinion after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises."

Added by § 407 of the Transportation Act of February 28, 1920, 41 Stat. 480. 49 U. S. C., § 5 (2).

what plaintiffs assert to be material evidence concerning the effect of such acquisition upon the public interest, the Commission failed to hold a hearing as required by the Act. They have now abandoned the first of these contentions. Copies of the report, 170 I. C. C. 4, and the supplemental report and order, 175 I. C. C. 542, together with a narrative of evidence before the Commission were attached to the complaint.

All the defendants prayed that the suit be dismissed. In substance they maintained that neither plaintiff is a legal entity or has capacity to maintain this suit on its own behalf or as representative of others and that neither was a party in interest before the Commission or has any pecuniary, property or legal right or interest injuriously affected or threatened by the order.

Plaintiffs applied to the court, consisting of three judges, for a temporary injunction. The motions to dismiss were submitted at the same time. The court held that plaintiffs failed to show that they had a right to maintain the suit. But, conceiving that on review dismissal on that ground might be deemed not sufficient finally to dispose of the litigation, it also passed upon the merits. Decree was entered accordingly. 59 F. (2d) 760.

The Rio Grande was built between 1871 and 1890. Its main line between Denver and Ogden, 782 miles, follows a circuitous and difficult route through mountainous country. It extends from Denver, a mile above sea level, southerly 120 miles to Pueblo where the elevation is 4,668 feet, thence westerly, northerly, southwesterly and northwesterly to Ogden. It rises to 10,240 feet over the continental divide at Tennessee Pass east of Dotsero and descends to a level of 4,583 at Grand Junction and 4,293 at Ogden. This line constitutes an important stretch for through transportation, via St. Louis and Chicago, between Pacific Coast points and the East. But as to traffic to or from the west originating at, destined to or passing through Denver, the Rio Grande is at a great disadvantage because of its circuitous route between Pueblo and Dotsero.

The Moffat Road was constructed between 1903 and 1913 and extends westerly from Denver 232 miles through Grand and Routt counties to Craig in Moffat county, Colorado. Its promoters at first intended to construct the line more than 250 miles farther into and through Duchesne and Uintah counties, Utah, to reach Provo,

Salt Lake or Ogden. But that became impossible, and it appears from the evidence that the company now has no such plans. Originally the line crossed the continental divide, rising from an elevation of 5,170 feet at Denver to 11,660 at Corona, and descending to 6,700 at Orestod, which is 41 miles northeasterly of Dotsero on the Rio Grande. The use of the line over the divide was so expensive and difficult that its abandonment was contemplated. Its continued operation was deemed of great importance to Denver and the northwestern part of Colorado. Accordingly the General Assembly of 1922 created the Moffat Tunnel Improvement District including all of Denver and parts or all of the counties traversed by the road, and provided for the construction of a tunnel to be used as a transportation facility for railroads, power, water, telephone and telegraph. The cost was to be covered by an issue of bonds and, if necessary, by special assessments on real estate in the District according to benefits determined by the Moffat Tunnel Commission which was also created by the Act. The tunnel was constructed at a cost of $15,470,000. In January, 1926, the district made a lease to the Moffat covering all railroad uses and the tunnel has since been used as a part of its line. The commission assessed the benefits against all real estate in the district at $45,000,000, of which 89% is upon property in Denver. The other parts of the district are mountainous and sparsely settled.

Construction of about 41 miles of line between Orestod on the Moffat and Dotsero on the Rio Grande and use by the latter of the Moffat road through the tunnel would reduce the distance between Denver and points on the Rio Grande west of Dotsero by 173 miles and avoid the heavy grades over the divide. The Interstate Commerce Commission's order declaring that public convenience and necesity require the cut-off and its order authorizing the Rio Grande to secure stock control of the Moffat open the way for this development.[2]

The complaint alleges that the Moffat Tunnel League is an unincorporated voluntary association organized for the purpose of assisting in the development of commercial interests and adequate transportation facilities in Grand, Routt and Moffat counties.

[2]See Colorado Sess. Laws, Ex. Sess., 1922, c. 2, p. 88. *Milheim* v. *Moffat Tunnel Dist.*, 72 Colo. 268; 262 U. S. 710. *Moffat Tunnel Imp. Dist.* v. *Denver & S. L. Ry. Co.*, 45 F. (2d) 715; certiorari denied, 283 U. S. 837.

The evidence shows that it consists of nine unnamed persons who were selected, three by each of the county boards of commissioners, from persons designated by commercial and other clubs none of which is identified. The complaint alleges that the Uintah Basin Railroad League is an unincorporated voluntary association organized to promote the interests of Uintah and Duchesne counties. The evidence tends to show that it was created shortly before the hearing to secure railroad facilities for these counties and that it is made up of clubs, towns and irrigation companies. But none of these is named or in any manner identified. It is said that the League also includes the boards of these two counties. But no authorization by local law or official action on the part of either is disclosed.

These leagues are not corporations, quasi-corporations or organized pursuant to or recognized by any law. Neither is a person in law and, unless authorized by statute, they have no capacity to sue. *Brown* v. *United States,* 276 U. S. 134, 141. *United Mine Workers* v. *Coronado Co.,* 259 U. S. 344, 385. *St. Paul Typothetae* v. *Bookbinders' Union,* 94 Minn. 351, 357. *Pickett* v. *Walsh,* 192 Mass. 572, 589. *Karges Furniture Co.* v. *Amalgamated, etc., Union,* 165 Ind. 421, 423. *Anti-Vice Committee* v. *Simon,* 151 La. 494. There is no federal statute that purports to give any unincorporated voluntary association standing to bring suit to set aside an order of the Commission. Every such suit must be brought against the United States. Urgent Deficiencies Act, 38 Stat. 219. 28 U. S. C., §§ 41 (28), 46, 48. And, save as authorized by the Congress, it may not be sued. The Act does not specify the classes of persons, natural or artificial, who may sue or what shall constitute a cause of action for the setting aside of an order. But it does require that the petition shall set forth "the facts constituting petitioner's cause of action" and by other provisions shows that for failure so to do the suit shall be dismissed. *Id.,* § 45. Consequently the complaint must show that plaintiff has, or represents others having, a legal right or interest that will be injuriously affected by the order. *Edward Hines Trustees* v. *United States,* 263 U. S. 143, 148. *Sprunt & Son* v. *United States,* 281 U. S. 249, 254. *Pittsburgh & W. Va. Ry.* v. *United States,* 281 U. S. 479, 486. Plaintiffs have failed to show that they are so qualified. Their interest is not a legal one. It is no more than a sentiment,

such as may be entertained by members of the public in the territory west of Craig, that the improvement of transportation facilities authorized by the Commission will lessen the possibility of construction by a rival of the Rio Grande of an extension of the Moffat to Utah common points. Cf. *Interstate Commerce Commission* v. *Oregon-Washington Co.*, — U. S. —.

Plaintiffs contend that they are empowered to sue by the first proviso of § 45a[3]. And they seek support from the second proviso of that section. But these clauses do not purport to authorize those within their terms to bring suit. The first provides that a party in interest to proceedings before the Commission in which an order is made may appear and be heard in a suit involving the "validity of such order . . . and the interest of such party". The second declares that "communities" and others there mentioned who are interested in the "controversy or question" in any suit brought by anyone under specified sections may intervene at any time after institution of the suit. The right so to appear and be heard or so to intervene in a suit brought by another is to be

[3] "The Attorney General shall have charge and control of the interests of the Government in the cases specified in section 44 of this title and in the cases and proceedings under sections 20, 43 and 49 of Title 49, . . . : *Provided*, That the Interstate Commerce Commission and any party or parties in interest to the proceedings before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party . . . : *Provided further*, That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or nonaction of the Attorney General therein.

"Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States." §§ 212, 213, Judicial Code. 28 U. S. C., § 45 (a).

distinguished from an authorization to bring suit. The case is utterly unlike *Chicago Junction Case,* 264 U. S. 258, 267; *Western Pacific* v. *South. Pac. Co.,* 284 U. S. 47, and *Claiborne-Annapolis Ferry* v. *United States,* 285 U. S. 382. In each of these a carrier brought suit to set aside an order of the Commission. No question of its capacity to sue was involved. The order assailed directly affected its transportation business.

Here plaintiffs have neither capacity to sue nor legal interest or right affected by the order.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.